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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

GERDA DOROTHEA DEWEERTH,

Petitioner,

vs.

EDITH MARKS BALDINGER and
WILDENSTEIN & CO., INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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SUPREME COURT, U.S.

QUESTION PRESENTED

In 1987, in a diversity case, the Second Circuit modified a New York statute of limitations materially and reversed the trial court's judgment for the plaintiff. In 1991, in a parallel case in the state courts, New York's highest court specifically disapproved the modification of New York law made by the Second Circuit as contrary to long-standing precedent. In 1992, on plaintiff's motion in the District Court under Fed. R. Civ. P. 60(b)(6), the judge granted plaintiff relief from the erroneous judgment and reinstated the original judgment in her favor.

The question presented is whether, on the appeal from the 1992 order under Rule 60(b)(6), the federal Court of Appeals (by a 2-1 vote) applied the wrong standard of review to reverse the order on the ground that in an *Erie* case a diversity plaintiff must "assume the risk" that a federal court may modify state law erroneously.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Gerda Dorothea DeWeerth, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in the above-entitled proceeding on May 16, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 24 F.3d 416, and is reprinted as appendix A hereto. The opinion of the United States District Court for the Southern District of New York (Broderick, D.J.) is reported at 804 F.Supp. 539, and is reprinted as appendix B.[1]

[1] References in the form "(A- ____)" are to pages of the appendices.

JURISDICTION

The judgment of the Court of Appeals was entered on May 16, 1994 (A-1). DeWeerth's petition for rehearing and suggestion for rehearing in banc was denied on August 23, 1994 (A-57). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULE INVOLVED

Rule 60(b) of the Federal Rules of Civil Procedure provides in part as follows:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) . . . it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time . . . .

STATEMENT

The instant petition arises out of the second phase of an action originally filed in 1983 by DeWeerth, a citizen of Germany, against Baldinger, a citizen of New York, in which the jurisdiction of the District Court was founded on 28 U.S.C. § 1332(a)(2). The second phase commenced in 1991 with a motion for relief from the judgment that was entered at the conclusion of the first phase. Fed. R. Civ. P. 60(b)(5) and (6). Reference to the first phase is necessary to an understanding of the second.

The First Phase

The dispute between DeWeerth and Baldinger concerns the ownership of a painting by Claude Monet in which the effect of a New York statute of limitations is critical.

On April 20, 1987, after a bench trial, Judge Vincent L. Broderick found that the painting had been inherited by

DeWeerth; that it was stolen from her in Germany in 1945; that the Monet was acquired by third-party defendant Wildenstein in 1956; and that Wildenstein sold the Monet to defendant Baldinger, a good faith purchaser, in 1957. When DeWeerth learned that Baldinger was in possession of the Monet, DeWeerth immediately demanded its return. Baldinger refused in February 1983, and the action promptly followed. In respect of the principal defense of Baldinger – the statute of limitations – Judge Broderick held on established New York authority that the three-year statute[2] did not begin to run until Baldinger refused DeWeerth's demand for the painting. *DeWeerth v. Baldinger*, 658 F.Supp. 688 (S.D.N.Y. 1987).

On Baldinger's appeal to the Second Circuit, the panel reversed the judgment. *Id.*, 836 F.2d 103 (2d Cir. 1987), *cert. denied*, 486 U.S. 1056 (1988). Although – as is explained below – New York law was to the contrary, the panel, favoring the bona fide purchaser, decided to tack onto the statute the new requirement that the pursuing owner must be reasonably diligent about *locating* the possessor (separately from any issue of laches). The Second Circuit then held, as a matter of law, that DeWeerth had not been sufficiently diligent in that respect.[3]

In 1991, however, the New York Court of Appeals decided *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 567 N.Y.S.2d 623 (1991). In that similar but unrelated case, the state's highest court took special note of *DeWeerth*, saying that "the Second Circuit should not have imposed a duty of reasonable diligence on the owners of stolen art work for purposes of the Statute of Limitations." 77 N.Y.2d at 318. Moreover, the state court held that the policy adopted by the Second Circuit favoring bona fide purchasers over owners was the reverse of the true and constant position, that it had long been the law and policy of New York to favor owners over such purchasers so that New

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[2] N.Y. Civ. Prac. L. & R. § 214(3) (McKinney 1990).

[3] The panel elected not to certify the issue to the New York Court of Appeals under the relevant procedure. *Id.*, 836 F.2d at 108 n. 5.

York would not become a haven for stolen art. *Id.* at 319. The high court noted the "abundant case law spelling out the demand and refusal rule", and that the rule "remains" the law of New York. *Id.* There was not, consequently, any question of predicting unsettled state law by the Second Circuit. In effect, the state high court held that Judge Broderick had been right.

The Second Phase

The Rule 60(b) Motion

DeWeerth now moved in the District Court under Rule 60(b)(5) and (6) for relief from the judgment in favor of Baldinger entered in the District Court pursuant to the Second Circuit's decision.* Under the Rule "the court may relieve a party . . . from a final judgment [when] . . .(5) . . .it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment." Judge Broderick granted DeWeerth's motion under clause (6) of Rule 60(b) and, alternatively, under clause (5) of the Rule.

Judge Broderick's 1992 decision noted that the Second Circuit, in its 1987 opinion of reversal, acknowledged that the due diligence requirement imposed on DeWeerth had not been adopted previously by the courts of New York; that the Circuit Court had decided to impose the requirement principally because of a supposed New York policy favoring bona fide purchasers, and that imposition of the requirement would bring the law of New York into harmony with the rule in *other* states. *DeWeerth*, 804 F.Supp. at 544 (A-34-35).

Judge Broderick held that, in light of *Guggenheim*, those grounds of decision disregarded constitutional norms of the highest importance. Citing *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), the Judge recalled the obligation of federal courts in

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* Prior to her motion under Rule 60(b), DeWeerth moved in the Second Circuit for the recall of that Court's mandate; the motion was denied without opinion on May 17, 1991 (A-5).

diversity cases to apply state law to the substance of disputes presented to them, noting that *Erie* rested on the constitutional "essence of our federalism"; that the old regime of *Swift v. Tyson*, 16 Pet. (41 U.S.) 1 (1842), which conduced to different results in adjacent federal and state courts, worked a denial of equal protection of the laws. *Guggenheim* meant, therefore, that the Circuit Court's decision in *DeWeerth* was no ordinary judicial error. *DeWeerth*, 804 F.Supp. at 545-46 (A-38-40).

Judge Broderick next considered that "the *Erie* rule must be balanced against the interest in finality of litigation" (A-41). Relying upon *Matarese v. LeFevre*, 801 F.2d 98 (2d Cir. 1986), *cert. denied*, 480 U.S. 908 (1987), he noted that Rule 60(b)(6) operates "where there are extraordinary circumstances" and that a "post-judgment change in the law having retroactive application may, in special circumstances, constitute an extraordinary circumstance warranting vacation of a judgment" (A-44). The Judge observed that judicial interest in finality often was subordinated to the interests of justice: he referred to decisions of federal courts of appeals recalling their mandates after intervening decisions in unrelated cases showed that the original appeals court's judgment was wrong. *DeWeerth*, 804 F.Supp. at 549 (A-44). He also referred to cases granting Rule 60(b)(6) motions to undo judgments that, in light of subsequent changes in state law, were now seen to violate the command of *Erie*. *Id.* at 549-50 (A-46). In short, Judge Broderick held that in this extraordinary case the policy favoring finality must yield, "to prevent the working of an extreme and undue hardship upon plaintiff, to accomplish substantial justice and to act with appropriate regard for the principles of federalism which underlie our dual judicial system . . . ." *Id.* at 550 (A-47).[5] The Judge also noted that Baldinger would not be prejudiced by the surrender of the painting, for she had a good claim over against Wildenstein. *Id.* at 552-53 (A-51-52).

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[5] Judge Broderick also held, alternatively, that Rule 60(b)(5), which authorizes relief from a judgment where "it is no longer equitable that the judgment should have prospective application," was available to DeWeerth. The Second Circuit also reversed this holding (A-20). That branch of the Circuit's decision is not a subject of this petition.

The Second Circuit's Reversal

On Baldinger's appeal, Judge Walker, joined only by Judge Altimari, reversed Judge Broderick's order granting relief despite the "broad authority" granted the trial judge by Rule 60(b)(6) to "relieve a party from a final judgment 'upon such terms as are just' . . ."[6] District Judge Owen, sitting by designation, dissented. (The pertinent text of the majority opinion is part II(A), at A-10).

The majority reversed on two grounds: (i) DeWeerth "assumed the risk" (A-14) of an errant decision by an *Erie*-bound federal court on a point of New York law. That view turned relevant precedent on its head and contradicted principles stated in other federal circuits; and (ii) it was an abuse of discretion by the District Judge to conclude that "the important interest in the finality of the [1987] judgment in this case was outweighed by any injustice DeWeerth believes she has suffered by choosing to litigate in the federal as opposed to the state forum" (A-17). That application of the rule of finality was driven by the same faulty assumption-of-risk theory, and, in effect, substituted a de novo standard of review for the proper abuse-of-discretion standard. Contrary to the intention of the Court and Congress, it subordinated Rule 60(b)(6) to finality even in a case of extraordinary injustice.

Judge Owen's dissent emphasized that it was the responsibility of the Court to correct the undoubted error of the 1987 panel (A-26).

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[6] *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863 (1988).

REASONS FOR GRANTING THE PETITION

The petition should be granted because (i) the "assumption of risk" theory adopted by Judges Walker and Altimari conflicts with *Erie* doctrine as understood in other federal courts of appeals and would encourage derogations from *Erie* that should be stopped by this Court; and (ii) the reversal of Judge Broderick under Rule 60(b)(6) for his supposed "abuse of discretion" simply substituted the judgment of the majority for that of the District Judge and, in effect, wrongly applied a de novo standard of review to his 60(b)(6) order, in conflict with the standard applied in other circuits.

I.

THE THEORY THAT A DIVERSITY PLAINTIFF "ASSUMES THE RISK" THAT FEDERAL COURTS MAY MODIFY STATE LAW IS NOVEL DOCTRINE INCOMPATIBLE WITH *ERIE* AS APPLIED IN OTHER CIRCUITS AND SHOULD BE REJECTED.

The opinion of Judge Walker is predicated on the assertion that Judge Broderick was wrong to relieve DeWeerth of the "consequences of her choice of forum," that DeWeerth "assumed the risk" of "choosing to litigate in the federal as opposed to the state forum." (A-12, 14, 17). The majority's risk theory is contrary to *Erie* doctrine as understood in other circuits and would undermine *Erie* fundamentally.

The only authority cited by the majority for its risk theory is a *district* court opinion that employs the idea in an utterly different sense. Indeed, the opinion in *Brown v. Clark Equip. Co.*, 96 F.R.D. 166 (D. Me. 1982), is a paradigm of *Erie* at work (A-12).

In a product liability case alleging negligent manufacture, the diversity plaintiff sought relief from a federal judgment dismissing the complaint; the judgment had applied strictly a slew of Maine state court decisions requiring privity between an injured plaintiff and a remote manufacturer. Shortly after

the federal judgment, the state high court abandoned the requirement of privity after having intimated in the so-called *McNally* case (decided before the federal judgment) that it wished to reexamine the issue in light of modern criticism. District Judge (as he then was) Cyr denied the application for 60(b) relief, saying,

> Plaintiffs elected to proceed in the federal forum, thereby voluntarily depriving themselves of the opportunity to attempt to persuade the Maine Law Court to abrogate the privity requirement, despite an open invitation, see *McNally*, at 924, to do exactly that.

Id. at 173.

This risk theory, which requires the diversity plaintiff to expect that the federal court will apply state law strictly, is the opposite of Judge Walker's, comports with *Erie*, and is well supported outside the Second Circuit. In a case in which an Illinois resident sued a non-resident corporation in federal court on a theory of tort liability unknown to Illinois law, Judge Posner affirmed the directed verdict for the defendant, saying, "we take this occasion to remind that resident litigants who seek adventurous departures in state common law are advised to sue in state rather than federal court." *Anderson v. Marathon Petroleum Co.*, 801 F.2d 936, 942 (7th Cir. 1986); *accord Shaw v. Republic Drill Corp.*, 810 F.2d 149, 150 (7th Cir. 1987) (per curiam) ("our policy will continue to be one that requires plaintiffs desirous of succeeding on novel state law claims to present those claims initially in state court"); *Pearson v. John Hancock Mutual Life Ins. Co.*, 979 F.2d 254, 259 (1st Cir. 1992) (litigant who sues in federal court when state court available "cannot justifiably complain if the federal court manifests great caution in blazing new state-law trails").

Judge Walker inverted the relevant standard. Moreover, Judge Walker's risk theory is irreconcilable with fundamental *Erie* principles.

Erie rests on "constitutional premises." *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring). It expresses – as Judge Broderick emphasized – "the very essence of our federalism." (A-40). To avoid the "debilitating uncertainty" of different results in adjacent federal and state courts, *Hanna*, 380 U.S. at 474 (Harlan, J., concurring), a federal court adjudicating state-created rights solely because of the diverse citizenship of the parties must regard itself as "only another court of the State." *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945) (Frankfurter, J.). Since a plaintiff in a lower state court does not assume the risk that the court will take adventurous liberties with state law, she cannot be said to do so in an indistinguishable federal court. That is how *Erie* is understood in federal courts of appeals. *See Burris Chemical, Inc. v. USX Corp.*, 10 F.3d 243, 247 (4th Cir. 1993) (federal courts apply "state law as it exists and do not surmise or suggest its expansion"); *Tarr v. Manchester Ins. Corp.*, 544 F.2d 14, 15 (1st Cir. 1976) (federal court does not "participate in an effort to change" state law); *Batts v. Tow-Motor Forklift Co.*, 978 F.2d 1386, 1389 (5th Cir. 1992) ("it is not our role to create or modify state law"); *Taylor v. Phelan*, 9 F.3d 882, 887 (10th Cir. 1993) ("we are generally reticent to expand state law without clear guidance from its highest court"); *Aftam Export Corp. v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358, 1370 (7th Cir. 1985) (Posner, J.) (federal court "disinclined to make bold departures" in state law); *Delahanty v. Hinckley*, 845 F.2d 1069, 1070 (D.C. Cir. 1988) (in diversity case, court "should normally decline to speculate on such a question of local doctrine").

The Court has said that, "*Erie* guarantees a litigant that if he takes his state law cause of action to federal court, and abides by the rules of that court, the result in his case will be the same as if he had brought it in state court." *Chambers v. Nasco, Inc.*, 501 U.S. 32, 53 (1991), quoting *Nasco, Inc. v. Calcasieu Television and Radio, Inc.*, 894 F.2d 696, 706 (5th Cir. 1990). That "guarantee" has particular importance to foreign plaintiffs like petitioner, who have long preferred to litigate in federal courts under the alienage jurisdiction of 28 U.S.C. § 1332 (a)(2) in the belief that federal judges are notably impartial toward alien plaintiffs. *See* Gary B. Born & David Westin, *International Civil*

Litigation in United States Courts 544-46 (2d ed. 1992). Also, defendants (foreign and domestic) with the right to remove state court actions to federal court on diversity grounds, 28 U.S.C. § 1441, look to that "guarantee" to ensure that the governing law will not change with the forum. In short, the guarantee contradicts the notion that litigants assume the risk that the federal court may go its own way on a point of state law.

The decision of the 1987 panel cannot be pardoned on the view of the 1994 majority that, "[i]t turned out that the *DeWeerth* panel's *prediction* was wrong" (A-14) (emphasis supplied). Prediction in an *Erie* case is doubtless permissible when state law is "unsettled" (A-13). But, as the New York Court of Appeals declared in its reproach to the 1987 panel, there was "abundant case law spelling out the demand and refusal rule", which "remains" the state law. *Guggenheim*, 77 N.Y. 2d at 319. There was, in short, nothing to predict; *Erie* simply required straightforward application of the abundant New York case law.

If Judge Walker's inverted risk theory were to gain acceptance, federal courts in diversity cases would soon regard *Erie* as a mere exhortation rather than a command. Plaintiffs could then be said to accept the hazards of imaginative reconstructions of state law, and, like plaintiffs who assume the risk of torts, could not complain of the consequences. That prospect requires the Court's intervention.

II.

THE REVERSAL OF JUDGE BRODERICK'S ORDER UNDER RULE 60(b)(6) WRONGLY APPLIED A DE NOVO STANDARD OF REVIEW INSTEAD OF THE DEFERENTIAL ABUSE-OF-DISCRETION STANDARD IN USE IN OTHER CIRCUITS, WHICH THE COURT SHOULD NOW ESTABLISH.

The Court has not established the standard of review applicable to orders granting relief under Rule 60(b)(6) and should do so. *See Salve Regina College v. Russell*, 499 U.S. 225, 227 (1991) (certiorari granted to establish standard of review). The

appropriate standard for such orders is the deferential abuse-of-discretion standard. *Harrell v. DCS Equipment Leasing Corp.*, 951 F.2d 1453, 1458 (5th Cir. 1992). Under that standard, a court of appeals may not substitute its view for the reasonable opinion of a district judge, as the majority did here.

Like other federal courts of appeals, the Second Circuit has used a deferential standard in cases of *denial* of relief under the Rule. *See Matarese*, 801 F.2d at 106-107.[7] But, in the instant case of a grant of the motion, Judge Walker, while professing the abuse-of-discretion standard (A-10), actually used a de novo standard of review, and, joined by Judge Altimari, substituted the majority's strict rule of finality for the trial judge's balance of the equities (A-17). That was improper. The Court disapproves such a substitution of judgment by a court of appeals for the assessment of the trial judge in a discretionary matter in which the trial judge acts reasonably. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981) (in reversing district court's forum non conveniens determination "the Court of Appeals seems to have lost sight of this rule, and substituted its own judgment for that of the District Court."); *accord American Dredging Co. v. Miller*, 114 S.Ct. 981, 989 (1994). The usurpation was particularly striking here: driven by the insupportable assumption-of-risk theory discussed above (A-17), the majority reduced Rule 60(b)(6) to a feeble piety when, as Judge Owen emphasized, DeWeerth had made a "most compelling" case under a Rule widely regarded as a "grand reservoir of equitable power to do justice" (A-24) (citations omitted).

The abuse-of-discretion standard for orders granting 60(b)(6) relief, properly applied, is consistent with the Court's expression of "confidence" in district court determinations under Rule

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[7] *Accord Cotto v. United States*, 993 F.2d 274, 277 (1st Cir. 1993) (denial under 60(b)(6)); *New Hampshire Ins. Co. v. Martech USA, Inc.*, 993 F.2d 1195, 1200 (5th Cir. 1993) (denial under 60(b)(2)); *Reinsurance Co. of America, Inc. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1277 (7th Cir. 1990) (denial under 60(b)(6)); *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 911 F.2d 363, 365 (9th Cir. 1990) (denial under 60(b)(5)); *Bristol Petroleum Corp. v. Harris*, 901 F.2d 165, 167 (D.C. Cir. 1990) (denial under 60(b)).

60(b), *Standard Oil Co. of Cal. v. United States*, 429 U.S. 17, 19 (1976) (per curiam); befits the open-ended character of Rule 60(b)(6), which, by authorizing motions "for any other reason justifying relief," contemplates cases that "utterly resist generalization," *Pierce v. Underwood*, 487 U.S. 552, 562 (1988); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990); and parallels the standard applied to the review of orders granting relief under kindred Rule 60(b)(5). *Rufo v. Inmates of Suffolk County Jail*, 112 S.Ct. 748, 762-63 (1992). It is anticipated by the Court's dictum that Rule 60(b)(6) gives the district judge "broad authority" to grant relief. *Liljeberg*, 486 U.S. at 863.

The two standards — de novo and abuse-of-discretion — are distinctly different categories of review. *See Pierce*, 487 U.S. at 558; *Salve Regina*, 499 U.S. at 233. As in *Piper*, the Court's intervention is required to clarify the position in respect of orders granting relief under Rule 60(b)(6) and to remedy a grave injustice to petitioner.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 22, 1994

APPENDIX A

BEST AVAILABLE COPY

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 83, 127—August Term 1993

(Argued November 15, 1993 Decided: May 16, 1994)

Docket Nos. 93-7144; -7146

GERDA DOROTHEA DEWEERTH,

Plaintiff-Appellee,

—v.—

EDITH MARKS BALDINGER,

Defendant-Third-Party-Plaintiff-Appellant,

—v.—

WILDENSTEIN & CO., INC.,

Third-Party-Defendant-Appellant.

Before:

ALTIMARI and WALKER, *Circuit Judges,*
and OWEN, *District Judge.**

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* Honorable Richard Owen, United States District Judge for the Southern District of New York, sitting by designation.

Plaintiff brought suit against defendant art-owner and third-party-defendant art gallery for return of stolen painting. The district court granted judgment in favor of plaintiff, 658 F. Supp. 688 (S.D.N.Y. 1987), and this court reversed, 836 F.2d 103 (2d Cir. 1987). Defendant and third-party-defendant now appeal from a judgment entered in the United States District Court for the Southern District of New York (Broderick, *J.*), granting plaintiff's motion pursuant to Fed. R. Civ. P. 60(b) for relief from the final judgment and entering a new judgment in favor of plaintiff. 804 F. Supp. 539 (S.D.N.Y. 1992).

REVERSED.

Judge Owen dissents in a separate opinion.

JOSEPH D. BECKER, Becker, Glynn, Melamed & Muffly, New York, New York (John R. Horan, Fox & Horan, New York, New York, of counsel), *for Plaintiff-Appellee.*

LESLIE GORDON FAGEN, Paul, Weiss, Rifkind, Wharton & Garrison, New York, New York, *for Defendant-Third-Party-Plaintiff-Appellant.*

JEREMY G. EPSTEIN, Shearman & Sterling, New York, New York, *For Third-Party-Defendant-Appellant.*

WALKER, *Circuit Judge*:

This appeal is the latest episode in a decade-long dispute over the ownership of an oil painting entitled "Champs de Blé à Vétheuil" by Claude Monet. The work by the celebrated French Impressionist was previously owned by plaintiff Gerda Dorothea DeWeerth, a German citizen. It was discovered missing from DeWeerth's family castle after World War II, and was subsequently purchased by defendant Edith Marks Baldinger, a New York resident, from third-party-defendant Wildenstein & Co., a New York art gallery. Baldinger and Wildenstein & Co. (referred to collectively as "defendants") appeal from a judgment entered in the United States District Court for the Southern District of New York (Vincent L. Broderick, *Judge*) that granted DeWeerth's motion pursuant to Fed. R. Civ. P. 60(b) for relief from the final judgment entered in favor of defendants in accordance with our decision in *DeWeerth v. Baldinger*, 836 F.2d 103 (2d Cir. 1987), *cert. denied*, 486 U.S. 1056 (1988), and entered a new judgment in plaintiff's favor. Defendants contend that the district court was precluded from considering DeWeerth's motion by both jurisdictional principles and the doctrine of the law of the case; that the district court abused its discretion in ordering relief pursuant to Rule 60(b)(5) and (6); and that the district court wrongly entered judgment in favor of DeWeerth based on the erroneous conclusions that her claim was not barred by laches and that her right to possession of the painting was superior to Baldinger's. We conclude that the district court was not barred from considering DeWeerth's motion, but that it abused its discretion in ordering relief from the final judgment based on Rule 60(b).

BACKGROUND

The facts of this case were fully explicated in the district court's initial *DeWeerth* opinion, 658 F. Supp. 688 (S.D.N.Y. 1987), and only a brief recitation of them will be provided here.

DeWeerth claims that her father purchased the Monet from a Berlin gallery in 1908 and that she inherited the painting after her father's death in 1922. She had the painting in her possession until 1943 when she transferred it to her sister's castle in southern Germany for safekeeping during World War II. DeWeerth's sister discovered that the painting was missing in 1945, after the departure of American soldiers who had been quartered in her home. The Monet resurfaced in 1956, at which time Wildenstein & Co. acquired it from a Swiss art dealer. Baldinger subsequently purchased the painting from Wildenstein in 1957 in undisputed good faith.

In 1982, DeWeerth discovered that Baldinger was in possession of the Monet and demanded its return. When Baldinger refused, DeWeerth promptly commenced a diversity action to recover it. Baldinger in turn brought a third-party action against Wildenstein & Co. which was subsequently severed pursuant to Fed. R. Civ. P. 42(b). In April 1987, after a bench trial, Judge Broderick found that DeWeerth had established a superior right to possession of the Monet and issued a ruling in her favor. 658 F. Supp. 688 (S.D.N.Y. 1987). The district court specifically rejected Baldinger's two principal defenses of limitations and laches. The district court concluded that the three-year statute of limitations applicable to this action, *see* N.Y. Civ. Prac. L. & R. § 214(3) (McKinney 1990), did not begin to run until Baldinger refused DeWeerth's demand for the painting. In answer to Baldinger's asser-

tion of laches, the district court determined that DeWeerth had been reasonably diligent in the pursuit of the Monet after 1945 and that Baldinger had not been prejudiced by any delay in the demand for the painting's return. The district court ordered Baldinger to deliver the painting to DeWeerth.

In December 1987, another panel of this court reversed the district court's judgment on the ground that New York limitations law required a showing of reasonable diligence in locating stolen property and that DeWeerth had failed to make such a showing. 836 F.2d 103 (2d Cir. 1987). We found it unnecessary to consider Baldinger's alternative arguments that DeWeerth was guilty of laches and that she had failed to prove superior title. On February 5, 1988, we denied DeWeerth's petition for a rehearing, and on February 19, 1988, our mandate directing that the judgment in favor of DeWeerth be reversed was filed in the district court. On June 13, 1988, the Supreme Court denied DeWeerth's petition for a writ of certiorari. 486 U.S. 1056 (1988).

On May 2, 1991, DeWeerth brought a motion before us to recall the prior mandate and vacate the judgment in light of *Solomon R. Guggenheim Foundation v. Lubell*, 77 N.Y.2d 311, 567 N.Y.S.2d 623 (1991), a decision by the New York Court of Appeals that held that the New York statute of limitations applicable to this action did not require a showing of reasonable diligence in locating stolen property. We denied the motion without opinion on May 17, 1991.

On September 27, 1991, DeWeerth moved in the district court for relief pursuant to Fed. R. Civ. P. 60(b)(5) and (6) on the same ground set forth in her motion to recall the mandate. By Memorandum Order dated October 16, 1992,

Judge Broderick granted DeWeerth's motion and once again ordered Baldinger to surrender the Monet to DeWeerth. 804 F. Supp. 539 (S.D.N.Y. 1992). Judgment was entered on February 2, 1993, and this appeal followed.

DISCUSSION

I. *Was the District Court Precluded From Considering DeWeerth's Rule 60(b) Motion?*

Defendants argue that the district court lacked jurisdiction to act upon DeWeerth's Rule 60(b) motion and, furthermore, that any ruling in DeWeerth's favor was precluded by the Second Circuit's denial of DeWeerth's motion for recall of its mandate. We reject both contentions.

A. *Jurisdiction*

Defendants contend that the district court improperly considered DeWeerth's Rule 60(b) motion because only the Second Circuit could alter or set aside its mandate. In taking jurisdiction over DeWeerth's post-judgment application, the district court properly relied on *Standard Oil Co. v. United States*, 429 U.S. 17 (1976) (per curiam). In that case, the Supreme Court made clear that a party wishing to pursue a Rule 60(b) motion to reopen a case that had been reviewed on appeal was not required to obtain leave of the appellate court or a withdrawal of the appellate court's mandate before proceeding in the district court. The Court reasoned that the district judge would not be flouting the existing mandate by acting on the motion since the appellate decision related only "to the record and issues then before the court, and [did] not purport to deal with possible later events." 429 U.S. at 18.

Defendants counter that our decision in *Eutectic Corp. v. Metco, Inc.*, 597 F.2d 32 (2d Cir. 1979) (per curiam), established the proposition that "where an appellant argues that the appellate court made a mistake, only the appellate court has jurisdiction to correct that mistake." Defs. Br. at 17-18. This statement mischaracterizes the holding in *Eutectic*, which decided only that a district court does not have jurisdiction to alter an appellate ruling where the appellate court has already considered and rejected the basis for the movant's Rule 60(b) motion. *Eutectic* did not discuss the rule established in *Standard Oil* that a district court may consider a Rule 60(b) motion when "later events" arise that were not previously considered by the appellate court. Despite *Eutectic*'s silence regarding *Standard Oil*, our court subsequently recognized the authority of *Standard Oil* in *Fine v. Bellefonte Underwriters Insurance Co.*, 758 F.2d 50 (2d Cir.), *cert. denied*, 474 U.S. 826 (1985). There, we upheld the district court's refusal to consider a Rule 60(b) motion since a *Standard Oil* situation had not been presented. We stated:

> Our previous ruling was the law of the case, and the district judge correctly found that it had no jurisdiction to review an appellate court's decision. Judge Sweet correctly noted that the appellants cite no material change of circumstances or newly discovered evidence so as to bring the matter under the aegis of *Standard Oil Co. v. United States*.

Id. at 52 (citations omitted); *see also Seese v. Volkswagenwerk, A.G.*, 679 F.2d 336, 337 (3d Cir. 1982) (per curiam) (Rule 60(b) movant did not fit within *Standard Oil* because basis for its motion was already considered by the court of appeals and the Supreme Court).

Based on DeWeerth's assertion that the *Guggenheim* decision constitutes a "change in circumstances" that was not considered by the appellate court, we conclude that, unless our post-*Guggenheim* refusal to recall the mandate constitutes a binding consideration of plaintiff's claim, the district court had jurisdiction to review her motion for relief under Rule 60(b). *See LSLJ Partnership v. Frito-Lay, Inc.*, 920 F.2d 476, 479 (7th Cir. 1990) (district court has jurisdiction to hear Rule 60(b) motion based upon alleged change in law arising after appellate court mandate). We now turn to the effect, if any, of our post-*Guggenheim* refusal to recall the mandate.

B. *The Law of the Case*

Defendants argue that *Eutectic* still applies in this case because the basis for DeWeerth's Rule 60(b) motion was presented to and rejected by this court in the course of DeWeerth's recall motion. Defendants' argument presumes that this court's denial of the recall motion should be construed as a comprehensive rejection on the merits of every argument presented in support of the motion. While this presumption holds true for arguments presented in petitions for rehearing, *see Fine*, 758 F.2d at 53, defendants have not brought to our attention any authority that applies the same presumption where the argument in question was presented in a motion to recall an appellate court's mandate.

In the absence of any authority on this point, we turn to the well-established principle that the doctrine of the law of the case "applies to issues that have been decided either expressly or by necessary implication." *Doe v. New York City Dep't of Social Servs.*, 709 F.2d 782, 788 (2d Cir.) (internal quotation omitted), *cert. denied*, 464 U.S. 864 (1983); *see also Panama Processes, S.A. v. Cities*

Serv. Co., 789 F.2d 991, 994 (2d Cir. 1986) ("While it is true that issues considered and disposed of by an appellate court on appeal cannot thereafter be altered by a district court, it may consider matters not explicitly or implicitly decided.") (citations omitted). In the absence of a statement of reasons by the circuit panel for the denial of DeWeerth's recall motion, the district court determined that the panel did not necessarily reject DeWeerth's arguments regarding the *Guggenheim* decision on the merits. On the contrary, the district court inferred that the panel denied DeWeerth's motion for the procedural reason that granting the requested relief was unnecessary in light of *Standard Oil*'s authorization to move in the first instance in the district court under Rule 60(b) where circumstances have changed.

Given DeWeerth's argument that she was seeking relief from the judgment based on a change in circumstances arising from the *Guggenheim* decision, she was not required to move for a recall of the court of appeals' mandate in order to pursue a Rule 60(b) motion in the district court, and the denial of her recall motion could as easily have been based on this ground as on the merits. Thus, the recall denial cannot be presumed to serve as a substantive decision barring her from seeking further relief in the district court. Indeed, such a presumption would contravene the Supreme Court's instruction in *Standard Oil* that the trial court, as opposed to the court of appeals, " 'is in a much better position to pass upon the issues presented in a motion pursuant to Rule 60(b).' " 429 U.S. at 19 (quoting *Wilkin v. Sunbeam Corp.*, 405 F.2d 165, 166 (10th Cir. 1968)). Post-judgment applications to modify a judgment for a ground covered by Rule 60(b) frequently are better made in the district as opposed to the circuit court. This is true even where the alleged change of circumstances is

exclusively legal, since a decision to reopen an action under Rule 60(b) will necessarily require fact-intensive weighing of the equities in a particular case, a task best undertaken in the first instance by the district courts.

Given these procedural circumstances, the district court properly determined that the basis for DeWeerth's Rule 60(b) motion had not been decided either explicitly or by necessary implication by this court, and that it was therefore free to rule on the application as it saw fit. Thus, the district court in this case had jurisdiction to consider DeWeerth's motion for relief from the judgment and was not barred from granting it based on this court's previous denial of her motion to recall our mandate.

II. *Did the District Court Abuse its Discretion in Granting DeWeerth's Rule 60(b) Motion?*

The district court granted DeWeerth's motion for relief from the final judgment under Rule 60(b)(6) and, alternatively, under Rule 60(b)(5). A "district court's grant or denial of relief under Rule 60(b), unless rooted in an error of law, may be reversed only for abuse of discretion." *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1138 (D.C. Cir. 1988); *see also Matarese v. LeFevre*, 801 F.2d 98, 107 (2d Cir. 1986), *cert. denied*, 480 U.S. 908 (1987).

A. *The Rule 60(b)(6) Determination*

Rule 60(b) provides that the district court may relieve a party or a party's legal representative from a final judgment, order, or proceeding in five enumerated circumstances and, according to the sixth subpart, for "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). We have held that subpart

(6) is "properly invoked where there are extraordinary circumstances or where the judgment may work an extreme and undue hardship." *Matarese*, 801 F.2d at 106 (internal quotations and citations omitted).

Judge Broderick determined that the *Guggenheim* decision, and its import for this case, constituted an "extraordinary circumstance" justifying relief under Rule 60(b)(6). Like *DeWeerth*, *Guggenheim* involved a suit by the owner of an allegedly stolen art object against the subsequent good faith purchaser for return of the stolen item. In the first appeal in *DeWeerth*, we held that New York's applicable statute of limitations required the previous owner to demonstrate that she had acted with reasonable diligence in attempting to locate the stolen object, and that absent such a showing, the owner's otherwise timely suit would be barred. 836 F.2d at 108. In *Guggenheim*, the New York Court of Appeals not only applied a contrary rule, but also expressly stated that the conception of New York law that we reached three years earlier in *DeWeerth* was wrong. In a unanimous decision, the Court of Appeals held that New York had a clearly established rule that the statute of limitations does not start to run until a *bona fide* purchaser refuses an owner's demand for return of a stolen art object, and that the Second Circuit should not have modified this rule by imposing a duty of reasonable diligence. 77 N.Y.2d at 318. It reasoned that the Second Circuit's decision contravened New York's longstanding policy of favoring owners over *bona fide* purchasers so that New York would not become a haven for stolen art. *Id.* at 319.

Based on the New York Court of Appeals' opinion, the district court determined that DeWeerth would have prevailed in this case had she originally brought her suit in the New York state courts. It then held that *Erie Railroad*

Co. v. Tompkins, 304 U.S. 64 (1938), and its progeny entitled plaintiff to a modification of the final judgment in this case to avoid this inconsistency. It determined that the countervailing interest of both the parties and the courts in the finality of litigation was outweighed by the need "to prevent the working of an extreme and undue hardship upon plaintiff, to accomplish substantial justice and to act with appropriate regard for the principles of federalism which underlie our dual judicial system." 804 F. Supp. at 550.

We have carefully considered the circumstances analyzed by the district court and conclude that they do not warrant relief under Rule 60(b)(6). While acknowledging that Judge Broderick engaged in a scholarly and thorough discussion of the issues, we think that his decision had the inappropriate effect of relieving DeWeerth of the consequences of her choice of forum. In our view, *Erie* simply does not stand for the proposition that a plaintiff is entitled to reopen a federal court case that has been closed for several years in order to gain the benefit of a newly-announced decision of a state court, a forum in which she specifically declined to litigate her claim. The limited holding of *Erie* is that federal courts sitting in diversity are bound to follow state law on any matter of substantive law not "governed by the Federal Constitution or by Acts of Congress." 304 U.S. at 78. However, the fact that federal courts must follow state law when deciding a diversity case does not mean that a subsequent change in the law of the state will provide grounds for relief under Rule 60(b)(6). *See Brown v. Clark Equip. Co.*, 96 F.R.D. 166, 173 (D. Me. 1982) ("mere change in decisional law does not constitute an 'extraordinary circumstance' " under Rule 60(b)(6), especially where "[p]laintiffs elected to proceed in the federal forum, thereby voluntarily depriv-

ing themselves of the opportunity to attempt to persuade the [state court]"); *Atwell v. Equifax, Inc.*, 86 F.R.D. 686, 688 (D. Md. 1980) (change in the state decisional law upon which appellate court based decision held "insufficient to warrant reopening a final judgment"). This principle also applies in federal cases where the Supreme Court has changed the applicable rule of law. *See Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 851 (5th Cir. 1990); *Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754, 757 (2d Cir.), *cert. denied*, 479 U.S. 885 (1986).

DeWeerth argues that this case is distinguishable because the state court did not announce a "change in the law," but rather clarified that New York law is—and always was—contrary to what the federal court held it to be. While we agree that *Guggenheim* did not involve a "change in the law" in the sense that it adopted a rule different from one that previously existed, we do not agree that *Guggenheim* stated that the question decided by the *DeWeerth* panel had long been settled in New York. The *Guggenheim* court stated only that New York's demand and refusal rule was well established; it did not state that the question of whether a due diligence requirement should be added to this rule was clearly settled. In fact, no earlier New York case had addressed this issue. The earlier *DeWeerth* panel noted that this question was an open one; although it could have certified the question to the New York Court of Appeals, it chose to decide the issue itself since it did not think that the issue would "recur with sufficient frequency to warrant use of the certification procedure." 836 F.2d at 108 n.5.

When confronted with an unsettled issue of state law, a federal court sitting in diversity must make its best effort to predict how the state courts would decide the issue. *Stafford v. International Harvester Co.*, 668 F.2d 142, 148

(2d Cir. 1981). The comprehensive opinion by now Chief Judge Jon O. Newman in *DeWeerth* accordingly surveyed New York caselaw and determined that a New York court called upon to decide the issue would be likely to impose a requirement of due diligence. The decision was based in part on the fact that plaintiff's argument would create an incongruity in the treatment of *bona fide* purchasers and thieves. In New York, the three-year statute of limitations starts running against thieves once the owner discovers that the art object has been stolen, while under plaintiff's theory, it would not start running against a good faith purchaser until he refused the owner's request to return the art object. The court determined in *DeWeerth* that this rule conflicted with a policy inherent in certain New York cases of protecting *bona fide* purchasers of stolen objects from stale claims by alleged owners. 836 F.2d at 108-09. Based on this incongruity, New York's policy of discouraging stale claims in other settings, and the fact that in most other states the limitations period begins to run when a good faith purchaser acquires stolen property thereby prompting due diligence on the part of the previous owner, we determined that New York courts would adopt a due diligence requirement for owners attempting to locate stolen property.

It turned out that the *DeWeerth* panel's prediction was wrong. However, by filing her state law claim in a federal forum, DeWeerth assumed the risk that her adversaries would argue for a change in the applicable rules of law and that any open question of state law would be decided by a federal as opposed to a New York state court. The subsequent outcome of the *Guggenheim* decision does not impugn the integrity of the *DeWeerth* decision or the fairness of the process that was accorded DeWeerth.

In fact, it appears that a key reason for the *Guggenheim* court's contrary conclusion was not even presented to the *DeWeerth* panel. In deciding not to adopt a due diligence requirement, the *Guggenheim* decision placed great weight on the fact that efforts to modify the demand and refusal rule by the New York State Legislature had been rejected. Specifically, in July 1986 Governor Mario Cuomo vetoed a bill passed by both houses of the State Legislature that would have caused the statute of limitations to start running from the time an art owner discovered or reasonably should have discovered the whereabouts of a work of art when bringing suit against certain not-for-profit institutions. As part of his veto message, Governor Cuomo stated that if the bill became law, it would have caused New York to become "a haven for cultural property stolen abroad." *See Guggenheim*, 77 N.Y.2d at 319. The *Guggenheim* court concluded that "[t]he history of this bill and the concerns expressed by the Governor in vetoing it, when considered together with the abundant case law spelling out the demand and refusal rule, convince us that that rule remains the law in New York and that there is no reason to obscure its straightforward protection of true owners by creating a duty of reasonable diligence." *Id.* The existence of this bill was not discussed in the *DeWeerth* opinion and apparently was not brought to the attention of the court. Thus, the prior *DeWeerth* panel was unable to consider a key component of the argument that was ultimately successful before the New York Court of Appeals.

We think that the prior *DeWeerth* panel made a reasonable prediction of how New York courts would decide the due diligence question given the information presented to it, and conclude that *Erie* and its progeny require no more than this. The fact that the New York

Court of Appeals subsequently reached a contrary conclusion in *Guggenheim* does not constitute an "extraordinary circumstance" that would justify reopening this case in order to achieve a similar result. There is nothing in *Erie* that suggests that consistency must be achieved at the expense of finality, or that federal cases finally disposed of must be revisited anytime an unrelated state case clarifies the applicable rules of law. Attempting to obtain such a result through Rule 60(b)(6) is simply an improvident course that would encourage countless attacks on federal judgments long since closed. While our conclusion relies in part on our belief that the prior *DeWeerth* decision fully comported with *Erie* and did not, as plaintiffs suggest, mistakenly apply settled state law and reach a clearly wrong result, we note that even if those were the circumstances, the doctrine of finality would still pose a formidable barrier to reopening the final judgment in this case.

The caselaw relied on by the district court as support for its decision is distinguishable from the present case. In *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975), *cert. denied*, 423 U.S. 1079 (1976), the Tenth Circuit granted Rule 60(b)(6) relief based on an Oklahoma Supreme Court decision that undermined the basis for the Tenth Circuit's three-year-old dismissal of plaintiff's action. However, a major factor in the *Pierce* decision was that the change in state law would have caused federal and state tort actions arising out of the same accident and involving the same parties to have opposite results. *See id.* at 723. In contrast, *DeWeerth* and *Guggenheim* do not arise out of the same facts.

In *American Iron and Steel Institute v. EPA*, 560 F.2d 589 (3d Cir. 1977), *cert. denied*, 435 U.S. 914 (1978), the Third Circuit recalled its mandate because a subsequent

Supreme Court case called into question the reasoning of the Third Circuit's decision issued one year and four months earlier. However, the court expressly stated that the mandate was recalled in part because the original panel decision placed on the defendant "continuing" obligations the validity of which was now suspect. *See id.* at 599. As discussed more fully below, the judgment in *DeWeerth* was finite in nature and did not have ongoing consequences for the parties involved. The other cases cited by the district court have fewer factual similarities to the instant case and provide even less persuasive authority for its holding.

We believe that the district court abused its discretion in determining that the important interest in the finality of the judgment in this case was outweighed by any injustice DeWeerth believes she has suffered by choosing to litigate in the federal as opposed to the state forum. Accordingly, we reverse the district court's decision granting her motion under Rule 60(b)(6).

B. *The Rule 60(b)(5) Determination*

Rule 60(b)(5) provides that a court may relieve a party from a final judgment where "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." Fed. R. Civ. P. 60(b)(5). The district court ruled that DeWeerth was entitled to relief under the prospective application clause of this Rule. Defendants contend that the final judgment in this case does not have prospective application and therefore is not subject to being reopened under this clause.

Since this circuit has never attempted to define the term "prospective application" as utilized in Rule 60(b)(5), we turn to a decision on this issue by the District of Columbia Court of Appeals. In *Twelve John Does*, the court analyzed the two Supreme Court cases that led to the promulgation of the prospective application clause, *United States v. Swift & Co.*, 286 U.S. 106 (1932), and *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856), and concluded that the standard to be applied "in determining whether an order or judgment has prospective application within the meaning of Rule 60(b)(5) is whether it is 'executory' or involves 'the supervision of changing conduct or conditions,' within the meaning of *Wheeling* and *Swift*." 841 F.2d at 1139. In *Wheeling*, the Court determined that the part of its former decree that directed the abatement of the construction of a bridge spanning the Ohio River was "executory" in nature since it required not only the removal of the bridge, but enjoined defendants against any reconstruction or continuance, and, as a "continuing decree," could be modified in light of a subsequent congressional act declaring the bridge lawful. 59 U.S. at 431. In *Swift*, the Court rejected a request to modify a previously-issued injunction in light of changed circumstances, but nonetheless observed that a "continuing decree of injunction directed to events to come," which involves "the supervision of changing conduct or conditions," "is subject always to adaptation as events may shape the need." 286 U.S.at 114.

In practical terms, these standards mean that judgments involving injunctions have "prospective application," while money judgments do not. *See Twelve John Does*, 841 F.2d at 1139. The district court recognized this dichotomy and determined that the final judgment in this case was more similar to an injunction than a money judg-

ment. It reasoned that the relief DeWeerth sought in bringing this suit would require Baldinger to perform the future act of physically returning the Monet and that the judgment rendered would have a continuing effect on future custody of the painting. It therefore concluded that the final judgment in this case had "prospective application" under Rule 60(b)(5). 804 F. Supp. at 551.

We think this conclusion was erroneous as a matter of law. The nature of the judgment sought in this case was a declaration of rights regarding title to personal property. The fact that physical transfer of the Monet would have been required to comport with the judgment if DeWeerth had prevailed does not render the judgment "executory." A similar transfer of assets is also required where the court enters a money judgment. Even if the district court in this case were involved in enforcing an ordered transfer, its involvement would not constitute "supervision of changing conduct or conditions."

DeWeerth's argument that declaratory judgments may have prospective application is also unpersuasive. The types of declaratory judgments referred to by DeWeerth, orders of disbarment and judgments which form a lien on property, affect events that happen in the future, and thus are distinguishable from the final judgment in this case, which simply resolved the parties' rights based on a past dispute. DeWeerth's reliance on *Moore's Federal Practice* for this point is misplaced since the treatise clearly recognizes the distinction between declaratory judgments directed at events to come, which may qualify for relief under Rule 60(b)(5) as though they were continuing injunctions, and declaratory judgments in which rights are fully accrued, which do not fall under the purview of the Rule. *See* 7 Moore & Lucas, *Moore's Federal Practice* ¶ 60.26[4], at 60-262 n.36 (1983).

As such, the only prospective effect of the court's judgment is its bar to future relitigation of custody to the painting. The district court relied on *Kirksey v. City of Jackson*, 714 F.2d 42 (5th Cir. 1983), for the proposition that the *res judicata* effect of a judgment may justify relief under Rule 60(b)(5) where there is a subsequent change in law. 804 F. Supp. at 551 n.11. The language in *Kirksey* relied upon was dicta, which stated that "[i]f a dismissal would bar a new and independent action between the same parties based on the same claims . . . then it would have 'prospective application' by virtue of the continuing effect of the bar." 714 F.2d at 43. This position has been called into doubt by our circuit, *see Sarkisian*, 794 F.2d at 757 n.4, and was expressly criticized by the D.C. Circuit in *Twelve John Does*, 841 F.2d at 1139-40. Indeed, *Kirksey* appears to have been repudiated by the Fifth Circuit itself, which has since held that a judgment is not prospective under Rule 60(b)(5) where its "only arguably prospective effect . . . is that it precludes relitigation of the issues decided." *Picco*, 900 F.2d at 851. Accordingly, we conclude that the final judgment in this case did not have prospective application as this term is utilized in Rule 60(b)(5) and that the district court's holding to the contrary was an error of law requiring reversal.

Because of our decision that it was inappropriate for the district court to grant relief under either Rule 60(b)(6) or 60(b)(5), it is unnecessary for us to consider defendants' further arguments that the district court wrongly decided the merits of their laches defense and the question of superior title.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the district court.

OWEN, *District Judge*

I respectfully dissent.

The majority recognizes that in dismissing Mrs. DeWeerth's action on New York statute of limitations grounds, the prior "DeWeerth panel's prediction was wrong". It was wrong in adding to New York's well-established demand and refusal rule a due diligence requirement, which the panel then found had not been met.[1] Nevertheless, the majority leaves the dismissal standing asserting that the prior panel was confronted with "an unsettled issue of state law," and that the doctrine of finality of judgments outweighs "any injustice Mrs. DeWeerth believes she has suffered by choosing to litigate in the federal forum as opposed to the state forum."

I am unable to accept either of these conclusions. As to the majority's view that the pre-*DeWeerth* New York law was "unsettled", no prior New York statute of limitations ruling has any suggestion of a pre-demand due diligence requirement, or that the issue was or even could have been

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[1] The prior panel stated as follows, 836 F.2d at 109-10:

> In light of New York's policy of favoring the good faith purchaser and discouraging stale claims and the approach to actions to recover property in other jurisdictions, we hold that under New York law an owner's obligation to make a demand without unreasonable delay includes an obligation to use due diligence to locate stolen property.

considered.[2] The New York Court of Appeals in *Gillet v. Roberts*, 57 N.Y. 28 in 1874, stated at 34:

> The rule is a reasonable and just one, that an innocent purchaser of personal property from a wrongdoer shall first be informed of the defect in his title, and have an opportunity to deliver the property to the true owner, before he shall be made liable as a tort feasor for a wrongful conversion.

This was followed by such cases as *Cohen v. M. Keizer, Inc.*, 246 App. Div. 277 (1st Dep't. 1936), 285 N.Y.S. 488 at 489:

> However, [defendant's] possession having been lawful and not tortious in the first instance, a demand upon him and his refusal to surrender possession before the commencement of the suit was necessary.

Thereafter, *Menzel v. List*, 22 A.D.2d 647, 253 N.Y.S.2d 43, 44 (1st Dep't. 1964), *on remand*, 49 Misc.2d 300, 267 N.Y.S.2d 804 (Sup. Ct. N.Y. Co. 1966), *modified on other grounds*, 28 A.D. 516, 279 N.Y.S.2d 608 (1st Dep't. 1967), *modification rev'd*, 24 N.Y.2d 91, 298 N.Y.S.2d 979, 246 N.E.2d 742 (1969), again held that "a demand by the rightful owner is a substantive, rather than a procedural, prerequisite to the bringing of an action for conversion by the owner[,]" and therefore, "the statute of limitations did not begin to run until demand and refusal." *Id.* at 647, 253 N.Y.S.2d at 44.

In *Kunstsammlungen Zu Weimar v. Elicofon*, 536 F. Supp. 829 at 848-49, the District Court for the Eastern

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[2] This would appear so, because the cause of action does not even come into existence under New York law until a demand is made and there is a refusal. *See*, New York authorities, *infra*. New York law does, of course, give consideration to the question of reasonable diligence in the context of a laches defense. *Guggenheim*, 77 N.Y.2d at 321.

District of New York in 1981 thoroughly reviewed the New York authorities and confirmed the foregoing.

Thereafter, the first *DeWeerth* opinion having issued in 1987, the New York Court of Appeals in 1991 in *Guggenheim Foundation v. Lubell*, 77 N.Y.2d 311, specifically focused on this question and reaffirmed New York Law, stating at 317-18,

> New York case law has long protected the right of the owner whose property has been stolen to recover that property, even if it is in the possession of a good-faith purchaser for value (*see*, *Saltus & Saltus v. Everett*, 20 Wend 267, 282). There is a three-year Statute of Limitations for recovery of a chattel (CPLR 214 [3]). The rule in this State is that a cause of action for replevin against the good-faith purchaser of a stolen chattel accrues when the true owner makes demand for return of the chattel and the person in possession of the chattel refuses to return it. (*see*, *e.g.*, *Goodwin v. Wertheimer*, 99 NY 149, 153; *Cohen v. Keizer, Inc.*, 246 App. Div. 277). Until demand is made and refused, possession of the stolen property by the good-faith purchaser for value is not considered wrongful (*see*, *e.g.*, *Gillet v. Roberts*, 57 NY 28, 30-31; *Menzel v. List*, 49 Misc.2d 300, 304-05, *mod as to damages* 28 A.D.2d 516, *rev'd* as to modification 24 N.Y.2d 91.

Having thus pronounced, *Guggenheim* went on to state at 318:

> We have reexamined the relevant New York case law and we conclude that the Second Circuit [in DeWeerth] should not have imposed a duty of rea-

> sonable diligence on the owners of the stolen art work for purposes of the Statute of Limitations.[3]

Accordingly, in my view, this case is a most compelling one for relief under Fed.R.Civ.P. 60(b)(6) which provides in pertinent part as follows:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment . . . for . . . (6) any other reason justifying relief from the operation of the judgment.

Subpart (6) of the said Rule, as stated by our Court in *Matarese v. LeFevre*, 801 F.2d 98 (2d Cir. 1986) at 106:

> "confers broad discretion on the trial court to grant relief when 'appropriate to accomplish justice,' " *International Controls Corp. v. Vesco*, 556 F.2d 665, 668 n.2 (2d Cir. 1977) (quoting *Klapprott v. United States*, 335 U.S. 601, 615, 69 S.Ct. 384, 390, 93 L.Ed. 266 (plurality opinion of Black, J.), *modified on other grounds*, 336 U.S. 942, 69 S.Ct. 384, 93 L.Ed. 266 (1949)), *cert. denied*, 434 U.S. 1014, 98 S.Ct. 730, 54 L.Ed. 2d 758 (1978); it constitutes a 'grand reservoir of equitable power to do justice in a

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[3] In 1986, a bill passed the New York legislature proposing a "discovery rule" providing that as to certain not-for-profit institutions the statute of limitations would run from the time those institutions gave notice, as specified in the bill, that they were in possession of a particular object. The bill was vetoed by Governor Cuomo. The majority recognizes, as do I, that the fate of this bill is wholly consistent with the pre-*Guggenheim* authorities, as *Guggenheim* itself observes, 79 N.Y.2d at 319:

> The history of this bill and the concerns expressed by the Governor in vetoing it, when considered together with the abundant case law spelling out the demand and refusal rule, convince us that that rule remains the law in New York and that there is no reason to obscure its straightforward protection of true owners by creating a duty of reasonable diligence.

particular case," *Radack v. Norwegian America Line Agency, Inc.*, 318 F.2d 538, 542 (2d Cir. 1963) (quoting 7 *Moore's Federal Practice*, ¶ 60.27 [2] at 60-295). It is "properly invoked where there are extraordinary circumstances, *Ackermann v. United States*, 340, U.S. 193, 199, 71 S.Ct. 209, 212, 95 L.Ed. 207 (1950); *see United States v. Cirami*, 563 F.2d [26, 32 (2d Cir. 1977)]; or where the judgment may work an extreme and undue hardship, *see United States v. Karahalias*, 205 F. 2d 331, 333 (2d Cir. 1953),' *In re Emergency Beacon Corp.*, 666 F.2d 754, 759 (2d Cir. 1981), and "should be liberally construed when substantial justice will thus be served." *Radack v. Norwegian America Line Agency, Inc.*, 318 F.2d at 542; *see also Dunlop v. Pan American World Airways, Inc.*, 672 F.2d 1044, 1051 (2d Cir. 1982); *United States v. Cirami*, 563 F.2d at 32.

The clear applicability of Rule 60(b)(6) to this case was well-stated by Judge Broderick below, 804. F. Supp. at 547:

> The range of fundamental policy and constitutional considerations which have informed the *Erie*[4] doctrine are fully evident in the present case. Failure to act on the present Rule 60 motion would deny Mrs. DeWeerth the right to recover her property solely because she initially brought this action in federal rather than state court. Had Mrs. DeWeerth brought suit in state court, her claim would have been deemed timely commenced under the applicable statute of limitations.
>
> Such inconsistency is exactly the type of result that *Erie* was enacted to avoid. As Justice Frankfurter

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4 *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

> noted, "[t]he nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State Court a block away should not lead to a substantially different result." *Guaranty Trust Company of New York v. York*, 326 U.S. 99, 109, 65 S.Ct. 1464, 1470, 89 L.Ed. 2079 (1945).

While unhesitatingly one with the majority as to the "integrity of the [prior] DeWeerth decision [and] . . . the fairness of the process that was accorded DeWeerth," I cannot accept the majority's statement that notwithstanding "[i]t turned out that the [prior] DeWeerth panel's prediction was wrong[,] . . . by filing her state law claim in a federal forum, DeWeerth assumed the risk . . ." of this error and its finality.[5] On the contrary, should not the impact of *Guggenheim* rather be shouldered by us, notwithstanding the integrity of our error?

Nor can I accept the majority's view that the application of Rule 60(b)(6) here would have the Court embark on "an improvident course that would encourage countless attacks on federal judgments long since closed." Rule 60 exists as a remedy in an extraordinary case to accomplish justice, *see Matarese v. LeFevre*, *supra*. This, I believe, is such a case. The desirability of finality of judgments should not deter us from using the Rule today because we may have to deal hereafter with the Rule's invocation in unworthy cases.

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[5] The majority expressly reaches this view stating that the district court abused its discretion in weighing "any injustice DeWeerth believes she has suffered by choosing to litigate in the federal as opposed to the state forum[,]" more heavily than "the important interest in the finality of the judgment in this case."

Accordingly, I would affirm on the scholarly and thorough opinion of Judge Broderick below.

APPENDIX B

BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

GERDA DOROTHEA DEWEERTH,

Plaintiff,

-against-

EDITH MARKS BALDINGER,

Defendant and Third-Party Plaintiff,

-against-

WILDENSTEIN & CO., INC.,

Third-Party Defendant.

----------X

83 Civ. 1233 (VLB)

MEMORANDUM ORDER (RULE 60 APPLICATION)

VINCENT L. BRODERICK, District Judge *

I

This action concerns plaintiff's claim to the ownership of a painting by Claude Monet entitled "Champs de Ble a Vetheuil" (the "Monet"), which was stolen from plaintiff in 1945 and purchased in good faith by the defendant in 1957 from third-party defendant Wildenstein & Co. On April 20, 1987, after a bench trial, I issued a decision including findings of fact and conclusions of law in this matter and ordered that judgment be rendered for the plaintiff requiring that the painting be returned to the plaintiff. *DeWeerth v. Baldinger*, 658 F.Supp. 688 (S.D.N.Y. 1987) (the "April 20 Order")[1] As discussed in greater detail

* [The following reproduces the text reported at 804 F.Supp. 539.]

[1] The bench trial was conducted on a "submitted" basis in which I reviewed written and videotaped depositions and exhibits submitted by the parties. *See* 658 F.Supp. at 690.

infra, that decision was subsequently reversed by the Court of Appeals. *DeWeerth v. Baldinger*, 836 F.2d 103 (2d Cir.1987), *cert. denied* 486 U.S. 1056, 108 S.Ct. 2823, 100 L.Ed.2d 924 (the "December 30 Order"). The Court of Appeals found that in this diversity case I had misapplied New York law.

Plaintiff has now moved for relief under Rule 60, Fed.R.Civ.P. The factual findings which I made with respect to the trial of this matter are necessary to consideration of plaintiff's motion and are repeated in part II below for convenience.

For the reasons set forth below, I conclude that the Rule 60 motion must be granted. In summary, the highest court of New York State has now ruled in *Guggenheim v. Lubell*, 77 N.Y.2d 311, 567 N.Y.S.2d 623, 569 N.E.2d 426 (1991), subsequent to the 1987 Second Circuit decision, that state law requires – and, according to the state court ruling, would previously have also required – a result which is consonant with my original determination. Because of the primacy of the state courts in determining interpretation of state law under principles of federalism, as discussed in greater detail below, the *Guggenheim* decision, albeit stating that it also reflects prior law, is a new development justifying Rule 60 relief.

The issue of laches, also discussed in greater detail below, was mentioned but left open in the 1987 Second Circuit decision, and raised anew by the defendant. The plight of good faith purchasers of art is an important factor in evaluating stolen art cases, as is the need to deter theft of art destined for the New York market. Both interests are relevant to balancing prejudice and reasonableness. Here, however, a nonbankrupt third party defendant from whom defendant purchased the stolen art remains in the case. Where upstream purchasers failed to exercise due care in purchasing, including examining the placement of an artwork in its context, its so-called "provenance," each defendant can, of course, follow up the chain of prior custody.

While in the wake of *Guggenheim*, *supra*, the Second Circuit declined to alter its mandate upon motion, *Standard Oil Co. v. United States*, 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976)

suggests that this may have been because the district court rather than the appellate court is the appropriate initial forum for seeking redress due to post-decisional changes in law or facts. *Fine v. Bellefonte Underwriters Ins. Co.*, 758 F.2d 50, 52 (2d Cir.1985), *cert. denied* 474 U.S. 826, 106 S.Ct. 86, 88 L.Ed.2d 70 (1985) also indicates that the district court is the appropriate tribunal where there is, as I find here, a "material change of circumstances. . . ."– in this instance because of the ruling of the State's highest court contrary to the 1987 federal appellate decision, and the state Court's assertion that its position reflects prior state law as well.[2]

II

There follows a reiteration of certain factual findings contained in my decision of April 20, 1987:

> "The Monet is an impressionistic depiction in oil of a wheat field, a village and trees near Vetheuil, France. It measures 65 centimeters by 81 centimeters, and is signed and dated "Claude Monet '79". Mrs. DeWeerth's father, Karl von der Heydt, purchased the Monet in or about 1908, and he thereafter kept it in his house in Bad Godesberg, West Germany. Plaintiff inherited the Monet from her father after his death on August 9, 1922, in the division of the works and objects of art in his estate. With the exception of the years 1927 to 1929, when the Monet was kept in her mother's house, plaintiff kept the Monet in her residence in Wuppertal-Elberfeld from 1922 until August 1943, where it was on display on a wall next to a sculpture by Auguste Rodin, also inherited from her father. This sculpture is still in plaintiff's possession at her West German residence, and plaintiff has

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[2] Should my interpretation of *Standard Oil* and *Fine* be incorrect, relief could still be afforded by means of the procedure utilized in the pre-*Standard Oil* decision in *United States v. Fernandez*, 506 F.2d 1200 (2d Cir.1974). In *Fernandez*, the Court of Appeals reversed a district court modification of a prior ruling as contrary to its mandate, but simultaneously issued a new mandate authorizing the district court to take the action involved.

submitted a 1943 photograph showing the Monet and the Rodin displayed together in her residence. From that time until the present, she neither sold nor otherwise disposed of the Monet, nor did she entrust the Monet to anyone else to sell or otherwise dispose of it.

"In August 1943, during the Second World War (the "War"), Mrs. DeWeerth sent the Monet, along with the Rodin sculpture and other valuables, by van to her sister Gisela von Palm (now deceased) in Oberbalzheim in Southern Germany, for safekeeping. Although the van arrived, plaintiff never saw the Monet again. In the fall of 1945, Gisela von Palm informed plaintiff of the disappearance of the Monet from Mrs. von Palm's house in Oberalzheim. There is no direct evidence as to what caused the disappearance of the Monet. American soldiers were quartered in the house after the close of the War in 1945, and it was after they had left that its disappearance was noted. I infer that either one of those soldiers, or someone else, stole the painting from the von Palm house where it had been sent for safekeeping.

"Mrs. DeWeerth was approximately 50 years old when she learned of the Monet's disappearance. Subsequently she made efforts to locate it. In 1946 she reported the loss of the Monet to the military government then administering the Bonn-Cologne area after the end of the War. In 1948 she solicited the assistance of her lawyer, Dr. Heinz Frowein, in attempting to find and recover it. Plaintiff also made inquiries in 1955 of one Dr. Alfred Stange, known to Mrs. DeWeerth as an art expert. In 1957 she reported the Monet as missing to the *Bundeskriminalamt* (the West German federal bureau of investigation) in Bonn. All of these efforts to find the Monet were unsuccessful.

"By December 1956 however, the Monet had found its way to the United States through Switzerland. Third-party defendant Wildenstein & Co., Inc.

("Wildenstein"), an art gallery in New York City, appears to have acquired the Monet on consignment from Francois Reichenbach, an art dealer from Geneva, Switzerland, in about December 1956. From December 1956 to June 1957, Wildenstein had possession of the Monet in New York. A Wildenstein record shows a 1962 payment, or credit, to Reichenbach, evidently for the Monet.

"In June 1957, Wildenstein delivered the Monet for inspection to Mrs. Baldinger at her residence at 710 Park Avenue, New York, New York. Mrs. Baldinger, after several days, purchased the Monet in good faith and for value from Wildenstein on or about June 17, 1957.

"After its purchase by Mrs. Baldinger, the Monet was publicly exhibited only on two occasions. Mrs. Baldinger exhibited the Monet at a benefit held in the Waldorf-Astoria Hotel in New York City, from October 29 to November 1, 1957, and loaned it to Wildenstein for display during a Wildenstein exhibition entitled "One Hundred Years of Impressionism" held April 2 to May 9, 1970 at its gallery in New York City. At the close of this exhibition, Wildenstein returned the Monet to Mrs. Baldinger. Except for those two exhibitions, Mrs. Baldinger maintained the Monet exclusively in her residence at 710 Park Avenue, New York City, from June 1957 to the present date.

"There are only four published references to the Monet in the art literature: two of them are in catalogues in connection with the exhibitions already cited, and the other two are in publications with which Wildenstein was apparently connected:

"(1) *Claude Monet: Bibliographie et Catalogue Raisonne, Vol. 1 1840-1881.* Published by la Bibliotheque des Arts, Lausanne, Paris; introduction by Daniel Wildenstein; collaborators Rodelphe Walter, Sylvie Crussard, and the Foundation Wildenstein, 1974, Geneva; painting no. 595.

"(2) The exhibition catalogue *One Hundred Years of Impressionism, A Tribute to Durand-Ruel, A Loan Exhibition*, April 2—May 9, 1970, Wildenstein Gallery, New York; painting no. 43.

"(3) *Monet: Impressions*, Daniel Wildenstein, published in New York, 1967, Library of Congress call no. ND553.M76W5313.

"(4) The exhibition catalogue *Festival of Art*, October 29—November 1, 1957, Waldorf-Astoria Hotel, New York; item 125.

"In or soon after July 1981, plaintiff, through the efforts of her nephew Peter von der Heydt, discovered that the Monet had been exhibited in 1970 at the aforementioned Wildenstein loan exhibition. Plaintiff thereafter retained counsel in New York in 1982 to determine whether Wildenstein knew the identity of the present possessor of the Monet. When Wildenstein refused to disclose the possessor's identity or the Monet's whereabouts, plaintiff commenced a proceeding in November 1982 against Wildenstein in New York State Supreme Court seeking "disclosure to aid in bringing an action." N.Y.C.P.L.R. §3102(c). On December 1, 1982, the State Supreme Court found for the plaintiff, ordering Wildenstein to reveal the identity of the possessor. Plaintiff thereafter learned that defendant Baldinger possessed the Monet.

"By letter to Baldinger dated December 27, 1982, plaintiff demanded return of the Monet. By letter dated February 1, 1983, Baldinger refused the demand. This action ensued."

April 20 Order, 658 F.Supp. at 690-692.

III

In my April 20, 1987 decision, I inferred that the Monet had been stolen from Frau von Palm's home in Germany and subsequently passed through a series of parties to Mrs. Baldinger.

Applying New York law, which holds that not even a bona-fide purchaser can acquire valid title from one who acquires title from a thief, I held that Mrs. DeWeerth had a right of title to the Monet superior to that of Mrs. Baldinger. I also held that plaintiff had timely commenced her suit pursuant to the three year limitations period applicable to actions seeking the recovery of stolen property provided by New York Civil Practice Law and Rules § 214 ("Section 214"). It was in accordance with these findings that judgment was entered for the plaintiff, directing that the Monet be returned to her.

In reversing the judgment, the Court of Appeals held that plaintiff's claim was barred by Section 214's three year limitations period. The Second Circuit noted that under New York law, where a plaintiff seeks recovery of a stolen chattel from one who innocently purchases such property, Section 214's limitations period does not begin to run until a demand for the return of the property has been made and that demand is refused. The Court also noted that New York law required that a plaintiff make such a demand within a reasonable period of time subsequent to learning the identity of a chattel's current possessor. In these respects, the Court did not disturb the legal conclusions which I had arrived at in my decision.

The Court then went on to hold that a plaintiff seeking the recovery of stolen property in New York had "a duty of reasonable diligence in attempting to locate stolen property" and that absent a showing that such diligence had been exercised, a chattel owner's otherwise timely suit would be time barred. 836 F.2d at 108. While acknowledging that this due diligence requirement had not previously been applied by the New York courts, the Court determined that its new rule was a justifiable application of New York law for three reasons.

First, the Court said that New York had a "policy of favoring the good faith purchaser" and of discouraging stale claims. *Id.* at 109.

Second, it noted that its decision brought the law in New York into harmony with the law of other jurisdictions. New York

courts had taken a uniquely pro-original owner position on issues in which the rights of original owners were balanced against those of subsequent purchasers. This minority position, the Court of Appeals pointed out, put New York's demand and refusal rule at odds with the rules applicable in other states. New York law needed to be made more harmonious with the law applicable in other jurisdictions:

> Other jurisdictions have adopted limitations rules that encourage property owners to search for their missing goods. In virtually every state except New York, an action for conversion accrues when a good-faith purchaser acquires stolen property; demand and refusal are unnecessary. (citations omitted). . . It is true that New York has chosen to depart from the majority view. Nevertheless, the fact that plaintiff's interpretation of New York law would exaggerate its inconsistency with the law of other jurisdictions weighs against adopting such a view.

836 F.2d at 109.

Finally, the Court stated that the imposition of a due diligence requirement would further the general policy promoted by any statute of limitations; the protection of defendants from stale claims. *Id.* at 108-109.

I had held that regardless of whether or not New York law could be construed as imposing a due diligence requirement upon original owners, plaintiff's suit would have been timely commenced, since the evidence demonstrated that the plaintiff made a " 'diligent although fruitless effort' " to locate the Monet. 658 F.Supp. at 694, quoting *Kunstsammlungen Zu Weimar v. Elicofon*, 536 F.Supp. 829, 849 (E.D.N.Y.1981), *aff'd* 678 F.2d 1150, 1160 (2nd Cir.1982). The Court of Appeals treated this finding as a legal conclusion and reviewed it *de novo*, reaching an opposite conclusion. It held that DeWeerth's efforts to locate the Monet had been "minimal" and that she had failed to satisfy the due diligence requirement the Court announced in its ruling.

On February 5, 1988 the Second Circuit denied DeWeerth's petition for rehearing and on February 19, 1988 the mandate of the Court of Appeals directing that the judgment in favor of plaintiff be reversed was filed in this court. Plaintiff's petition for a writ of certiorari was denied by the United States Supreme Court on June 13, 1988.

IV

On February 14, 1991 the New York Court of Appeals, in an unrelated case, considered the identical issue which had been ruled upon by the Second Circuit in *DeWeerth*: whether or not New York law imposed a duty of due diligence upon owners attempting to recover stolen property from subsequent good faith purchasers. In a unanimous decision written by Chief Judge Wachtler, that Court ruled that no such duty existed, or had existed, under New York law. *Guggenheim v. Lubell*, 77 N.Y.2d 311, 567 N.Y.S.2d 623, 569 N.E.2d 426 (1991).[3]

The New York Court of Appeals concluded that New York's demand and refusal rule, which would be substantially modified by the imposition of a due diligence requirement, was supported by prior New York case law. The Court cited in its ruling the fact that New York's Governor had recently vetoed a bill which would have barred certain suits seeking the recovery of stolen art works from non-profit institutions three years after such institutions gave a statutorily specified notice that they possessed such objects. In vetoing this bill, the Governor expressed concern that its enactment "would have caused New York to become 'a haven for cultural property stolen abroad' ". 567 N.Y.S.2d at 627, 569 N.E.2d at 430 (quoting Veto Message of Governor Cuomo, New York State Assembly Bill 11462-A [1986]).

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[3] The state trial court in *Guggenheim v. Lubell* had granted summary judgment in favor of the subsequent purchaser, relying upon the Second Circuit's decision in *DeWeerth*. See 77 N.Y.2d at 316; 567 N.Y.S.2d at 625, 569 N.E.2d at 428. The Appellate Division, Second Department modified the trial court judgment to deny summary judgment; it dismissed a statute of limitations defense; and it certified the question of the propriety of its disposition to the New York Court of Appeals. 153 A.D.2d 143, 550 N.Y.S.2d 618 (1990).

Although the Second Circuit's decision in *DeWeerth* concerned an unrelated controversy, the New York Court of Appeals in *Guggenheim* explicitly held that the due diligence requirement announced in *DeWeerth* was contrary to state law:

> We have reexamined the relevant New York case law and we conclude that the Second Circuit should not have imposed a duty of reasonable diligence on the owners of stolen art work for purposes of the Statute of Limitations.
>
> . . . The history of [proposed legislation seeking to establish a discovery rule for the recovery of stolen art works] when considered together with the abundant case law spelling out the demand and refusal rule, convince us that that rule remains the law in New York and that there is no reason to obscure its straightforward protection of true owners by creating a duty of reasonable diligence.

77 N.Y.2d at 319, 567 N.Y.S.2d at 626-627, 596 N.E.2d at 429-430.

In May 1991 plaintiff moved before the Second Circuit for the recall of its mandate of February 19, 1988, arguing that since the New York Court of Appeals had held the *DeWeerth* decision to have been incorrect, the Court was required to withdraw its mandate, vacate its judgment and affirm the judgment issued in the district court. This motion was denied without opinion.

V

The "ultimate source for state law adjudication in diversity cases is the law as established by the constitution, statutes, or authoritative court decisions of the state." *Factors Etc. Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 283 (2nd Cir.1981), *cert. denied* 456 U.S. 927, 102 S.Ct. 1973, 72 L.Ed.2d 442 (1982). Accordingly, a "federal court sitting in diversity must follow the law directed by the Supreme Court of the state whose law is found to be applicable . . ." *Plummer v. Lederle Laboratories*, 819 F.2d 349, 355 (2nd Cir.1987), *cert. denied* 484 U.S. 898, 108 S.Ct. 232, 98 L.Ed.2d 191 see also *Deeper Life Christian Fellowship Inc. v. Sobol*, 948 F.2d 79, 84 (2nd Cir.1991).

Primacy of state court interpretation in matters of state law is a constitutional and statutory principle dating back to the founding of the Republic. As a matter of statutory construction, the principle was originally set forth in Section 34 of the Judiciary Act of 1789, the "Rules of Decision Act".* As amended in 1948, the Act provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

In *Swift v. Tyson*, 16 Pet. (41 U.S.) 1, 10 L.Ed. 865 (1842), the United States Supreme Court held that the Rules of Decision Act's reference to the "laws of the several states" meant that the federal courts were bound to apply state statutes and constitutional enactments, as well as to follow those state court decisions which either interpreted such enactments or dealt with questions of real estate or other "immovable" matters of local law. The Court held that on issues of general commercial law, however, federal courts were free to disregard state court decisions in favor or those "general principles and doctrines of commercial jurisprudence" which the federal courts found most appropriate. 41 U.S. at 18-19. In subsequent years, although the *Swift* doctrine remained elusive of precise definition, the areas of "general law" pursuant to which the federal courts became free to fashion their own pronouncements were eventually construed to include a wide range of subjects. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 75-76, 58 S.Ct. 817, 821, 82 L.Ed. 1188 (1938).

The Supreme Court repudiated the *Swift* doctrine in *Erie*. In *Erie*, the Court declared that federal courts were bound to follow state law, including the construction of those laws by a state's highest court, on any matter not governed by the federal Constitution or a federal statute.

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* Act of Sept. 24, 1789, 1 Stat. 92, codified as amended at 28 U.S.C. § 1652.

The *Erie* decision was based in part upon the Rules of Decision Act and in part upon constitutionally based considerations of federalism, some of which are particularly relevant here. *Erie* held that the application of differing rules to the same issues by federal and state courts had given plaintiffs who were non-residents of a state in which a defendant resided the advantage of being able to choose the most advantageous forum in which to sue. Thus, according to Justice Brandeis, "the doctrine rendered impossible equal protection of the law" since it arbitrarily favored non-resident plaintiffs over resident defendants. 304 U.S. at 74-75, 58 S.Ct. at 820-821.

Erie also recognized that one of the central goals of the *Swift* doctrine – to promote national uniformity in matters of "general law" – had proved illusory and that the uncertainty of the "demarcation between the province of general law and that of local law [had] developed a new well of uncertainties." 304 U.S. at 74, 58 S.Ct. at 820. Thus *Erie* sought to eliminate the "spurious uniformity" of the *Swift* doctrine.[5]

Erie can also be seen as implicitly recognizing that state judges are often more knowledgeable in applying the intricacies of state law and policy than their federal counterparts. *Erie* placed the primary responsibility for developing and interpreting state law upon a locally chosen judiciary which would be especially sensitive to the dynamics of the legal rules applicable in its jurisdiction.

Erie held that no provision of the Constitution purported to bestow upon the federal courts the power to declare the substantive rules governing state common law and that the *Swift* doctrine constituted "an unconstitutional assumption of powers by courts of the United States." 304 U.S. at 78-80, 58 S.Ct. at 822-823, quoting *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370-372, 30 S.Ct. 140, 147-148, 54 L.Ed. 228 (Holmes J., dissenting). Justice Brandeis approvingly cited the dissenting opinion of Justice Field in *Baltimore & Ohio R. Co. v. Baugh*, 149 U.S. 368, 401, 13 S.Ct. 914, 927, 37 L.Ed 772 in the course of describing the fundamental principle at stake:

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[5] See Friendly, *In Praise of Erie – and of the New Federal Common Law*, 39 N.Y.U.L.Rev. 383, 384 (1964).

> '[T]here stands . . . the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.'

Erie R. Co. v. Tompkins, 304 U.S. at 78-79, 58 S.Ct. at 822-823, quoting *Baltimore & Ohio R. Co. v. Baugh*, 149 U.S. 368, 401, 13 S.Ct. 914, 927 (Field J., dissenting).

It has been said that *Erie* "implicates, indeed perhaps it is, the very essence of our federalism".[6] The protection of state autonomy has continued to be a vital component of Supreme Court jurisprudence over a wide range of subject areas. The underlying constitutional foundation of *Erie* was reaffirmed in subsequent Supreme Court decisions. See *Bernhardt v. Polygraphic Company of America Inc.*, 350 U.S. 198, 76 S.Ct. 273, 100 L.Ed. 199 (1956); *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965).

When principles underlying *Erie* interact with other established principles governing the conduct of business in our courts, the resulting determination must take cognizance of *Erie*'s position at the heart of our system.

VI

With respect to many of the decisions in which the federal courts are called upon to interpret and apply state law, *Erie* lends itself to relatively straightforward application. Were this a case in which I was being called upon merely to determine whether

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[6] Ely, *The Irrepressible Myth of Erie*, 87 Harv.L.Rev. 693, 694 (1974).

to follow an interpretation of state law reached by the federal appellate court or one subsequently articulated by New York's highest court, the result would be obvious.

In this case, however, the *Erie* rule must be balanced against the interest in finality of litigation. Plaintiff moved for relief in an earlier motion before the Second Circuit. I must therefore determine how to interpret that Court's denial of plaintiff's motion. The Second Circuit's ruling on plaintiff's motion must be analyzed in terms of the relationships between *Erie*, and Rule 60(b) in order to determine the proper treatment of plaintiff's application before me.

VII

The range of fundamental policy and constitutional considerations which have informed the *Erie* doctrine are fully evident in the present case. Failure to act on the present Rule 60 motion would deny Mrs. DeWeerth the right to recover her property solely because she initially brought this action in federal rather than state court. Had Mrs. DeWeerth brought suit in state court, her claim would have been deemed timely commenced under the applicable statute of limitations.

Such inconsistency is exactly the type of result that *Erie* was enacted to avoid. As Justice Frankfurter noted, "[t]he nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result." *Guaranty Trust Company of New York v. York*, 326 U.S. 99, 109, 65 S.Ct. 1464, 1470, 89 L.Ed. 2079 (1945).

As noted *supra*, the Second Circuit's decision in *DeWeerth* was partially based upon the Court's view that New York's rules governing the recovery of stolen property needed to be made more harmonious with the rules of other jurisdictions. It was necessary for the State of New York to impose a due diligence requirement, the Second Circuit held, not only because it made sense as a matter of state law precedent and policy, but because

the failure to change New York's demand and refusal law "would exaggerate its inconsistency with the law of other jurisdictions." 836 F.2d at 109. The subsequent decision of the New York Court of Appeals in *Guggenheim*, however, provides a construction of New York law which, under *Erie*, is controlling,[7] and which involved an explicit rejection of the Second Circuit's *DeWeerth* approach.[8]

The *Guggenheim* Court grounded its decision on a range of policy considerations growing out of its concern that any legal rules established by the courts be cognizant of New York's special role as a world art center:

> The backdrop for this replevin action . . . is the New York City art market, where masterpieces command extraordinary prices at auction and illicit dealing in stolen merchandise is an industry all its own . . .
>
> [O]ur decision today is in part influenced by our recognition that New York enjoys a worldwide reputation as a preeminent cultural center. To place the burden of locating stolen artwork on the true owner and to foreclose the rights of that owner to recover

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[7] Judge Friendly has noted that among the many reasons for *Swift*'s failure to achieve national legal uniformity in the years prior to *Erie* was the difficulty of having any one federal court, particularly below the level of the United States Supreme Court, lead other state and federal courts by its persuasive example. "Although the New York Court of Appeals might bow to the superior wisdom of the Supreme Court . . . on a point of commercial law, one could hardly expect similar deference to a decision of three judges of an intermediate federal appeals court." Friendly, *In Praise of Erie – And of the New Federal Common Law*, 39 N.Y.U.L.Rev. 393, 406 (1964).

[8] A decision in favor of defendant on this Rule 60 application would further the admittedly desirable goal of national legal uniformity, but where interpretation of state law is concerned, this cannot be done where contrary to the state's own construction of that law. The constitutional objective of limiting interstate trade barriers is, of course, furthered primarily by authorization of congressional action under Article I § 8 cl 3, and by application of that clause to bar undue burdens on commerce created by state or local action, not claimed to be involved here.

> its property if the burden is not met would, we believe, encourage illicit trafficking in stolen art. 77 N.Y.2d at 314, 320, 567 N.Y.S. 2d at 624, 628, 569 N.E.2d at 427, 431.

As stated in *Hoelzer v. City of Stamford*, 933 F.2d 1131, (2d Cir.1991):

> Underlying the New York court's decision [in *Guggenheim*] to dispense with the due diligence requirement was an awareness that lost art is extremely difficult to recover, and a policy determination that the burden of proving ownership should not be shifted onto the 'wronged owner' who has already suffered the theft of valuable property.

This court is "obliged to give full effect to decisions of New York's highest Court on issues involving the application of New York law." *Sanchez v. United States*, 696 F.2d 213, 216 (2nd Cir.1982).

VIII

Plaintiff's instant motion is brought under Federal Rules of Civil Procedure 60(b)(5) and (6). Pursuant to Rule 60(b)(5), a party may be relieved from a final judgment or order, *inter alia*, where the judgment "has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." Rule 60(b)(6) provides for relief from a final judgment where there is "any other reason justifying relief from the operation of the judgment." Motions pursuant to Rule 60(b) are addressed to the sound discretion of the district court. *Mendell In Behalf of Viacom, Inc. v. Gollust*, 909 F.2d 724, 731 (2nd Cir.1990), *aff'd* ____U.S.____, 111 S.Ct. 2173, 115 L.Ed.2d 109 (1991).

Rule 60(b)(6) "confers broad discretion on the trial court to grant relief when 'appropriate to accomplish justice.'" *International Controls Corp. v. Vesco*, 556 F.2d 665, 668 n. 2 (2nd Cir.1977), *cert. denied* 434 U.S. 1014, 98 S.Ct. 730, 54 L.Ed.2d

758 (1978) (quotation omitted). "It is 'properly invoked where there are extraordinary circumstances,' [citations omitted] or where the judgment may work an extreme and undue hardship, [citations omitted] and 'should be liberally construed when substantial justice will thus be served' ". *Matarese v. LeFevre*, 801 F.2d 98, 106 (2nd Cir.1986), *cert. denied* 480 U.S. 908, 107 S.Ct. 1353, 94 L.Ed.2d 523 (1987).

"A postjudgment change in the law having retroactive application may, in special circumstances, constitute an extraordinary circumstance warranting vacation of a judgment." *Matarese v. LeFevre*, 801 F.2d 98, 106, *citing, inter alia, Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir.1975), *cert. denied* 423 U.S. 1079, 96 S.Ct. 866, 47 L.Ed.2d 89 (1976); *McGrath v. Potash*, 199 F.2d 166 (D.C.Cir.1952); see also *Adler v. Berg Harmon Associates*, 790 F.Supp. 1235, 1245 n. 10 (S.D.N.Y.1992).

Even more directly on point to the facts here, however, courts have widely ruled that where a United States Supreme Court decision enacted subsequent to the issuance of an appeals court mandate "showed that [the] original judgment was demonstrably wrong," an appellate mandate may be properly withdrawn, even where the superseding determination comes more than a year after the appellate mandate has been issued. *See American Iron and Steel Institute v. E.P.A.*, 560 F.2d 589, 594 (3d Cir.1977), citing *Greater Boston Television Corp. v. F.C.C.*, 463 F.2d 268, 278 n. 12 (D.C.Cir.1971), and quoting *Legate v. Maloney*, 348 F.2d 164, 166 (1st Cir.1965); see also *Zipfel v. Halliburton Co.*, 861 F.2d 565 (9th Cir.1988); *Adams v. Merrill, Lynch, Pierce, Fenner & Smith*, 888 F.2d 696 (10th Cir.1988). At least one Second Circuit case has also explicitly relied upon this principle. See *Tarkington v. United States Lines Co.*, 222 F.2d 358 (2nd Cir.1955).

In *American Iron and Steel*, plaintiffs requested the recall of a Third Circuit mandate, arguing that a United States Supreme Court decision on a series of environmental regulations rendered one year and four months subsequent to a related decision by the Third Circuit had called the correctness of the Third Circuit's determination into question. In ruling on

plaintiff's motion, the Third Circuit held that the Supreme Court's decision had not disapproved the Third Circuit's holding and indeed had cited to the Appeals Court ruling at numerous points in its opinion. The court nevertheless determined that its mandate should be recalled, reasoning that although the Appeals Court ruling had not been "demonstrably wrong", it had evidenced a sufficient "disparity" with the Supreme Court's ruling to indicate the need for corrective action:

> Where, as here, a decision of the Supreme Court – the preeminent tribunal in our judicial system – departs in some pivotal aspects from those of lower federal courts, amendatory action may be in order to bring the pronouncements of the latter courts into line with the views of the former. . . . recall of a mandate traditionally has been warranted when and to the extent necessary "to protect the integrity" of a court's earlier judgment. Certainly, such integrity may be jeopardized when the solemn declarations of a court are called into question by a later Supreme Court opinion.

American Iron and Steel, 560 F.2d at 596 (citations omitted). Here, of course, the highest court as to matters of New York state law is New York's Court of Appeals.

In addition to its concern that a subsequent Supreme Court decision had called its earlier ruling into question, the *American Iron and Steel* court determined to withdraw its mandate by virtue of a "*confluence* of several unusual factors" present in that case. 560 F.2d at 600 (emphasis in original). As in *American Iron and Steel*, critical factors, albeit different from the considerations utilized by the court in *American Iron and Steel*, argue for granting plaintiff's motion here.

In contrast to the arguable disparity created by the subsequent Supreme Court opinion treated in *American Iron and Steel*, the New York Court of Appeals in this instance did not issue an opinion which created an arguable disparity with the results reached by the Second Circuit; it explicitly held contrary

to *DeWeerth*. In addition, the New York Court of Appeals in *Guggenheim* indicated that its interpretation of state law as applied in cases of this type is of great importance to the art industry in New York.

Erie principles have served in other cases as the basis for a reversal of final judgments after a subsequent clarification of the law. See *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir.), *cert. denied* 423 U.S. 1079, 96 S.Ct. 866, 47 L.Ed.2d 89 (1976). *Pierce* concerned two plaintiffs asserting claims arising out of a common vehicular accident. One plaintiff's claim was heard in federal court and the second plaintiff had his case determined in a state forum. In the federal suit, the Tenth Circuit affirmed the grant of summary judgment to defendant in the case, applying a well established rule of Oklahoma state law. In the state suit, however, after having his claim against the same defendant dismissed by the trial court, plaintiff appealed to the Oklahoma Supreme Court, which overruled the decision upon which both the state trial court and the Tenth Circuit had relied.

Although the Oklahoma Supreme Court decision had come more than three years subsequent to the Tenth Circuit's dismissal of the federal plaintiff's claims, the Tenth Circuit granted plaintiff's 60(b)(6) motion:

> We are concerned with an action in which federal jurisdiction depends on diversity. In diversity jurisdiction cases the results in federal court should be substantially the same as those in state court litigation arising out of the same transaction or occurrence. Here they were not . . . The outcome determination principle mandated by Erie v. Tompkins has been violated.

518 F.2d at 723 (citations omitted); see also *First American National Bank of Nashville v. Bonded Elevator, Inc.*, 111 F.R.D. 74 (W.D.Ky.1986).[9]

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[9] *Pierce* is distinguishable from the instant action in that *Pierce* involved claims arising out of a common accident. With respect to the *Erie* principles at stake,

(Footnote continued)

As *American Iron and Steel* and *Pierce* demonstrate, the fact that the New York Court of Appeals decision in *Guggenheim* came three years subsequent to the Second Circuit's interpretation of New York's demand and refusal law does not bar plaintiff's claim here. Indeed, courts have granted Rule 60(b)(6) relief when the periods between an initial judgment and a subsequent superseding decision spanned substantially greater periods of time. See *Tsakonites v. Transpacific Carriers Corp.*, 322 F.Supp. 722 (S.D.N.Y.1970) (granting 60(b)(6) relief where more than a five year period intervened between the district court's judgment and a subsequent United States Supreme Court decision which indicated that the district court judgment was error.)

In order to prevent the working of an extreme and undue hardship upon plaintiff, to accomplish substantial justice and to act with appropriate regard for the principles of federalism which underlie our dual judicial system in this extraordinary case, I hold plaintiff is entitled to similar relief here.[10]

IX

Apart from Rule 60(b)(6), a party may obtain relief under Rule 60(b)(5) where "it is no longer equitable that the judgment should have prospective application." Although the term "prospective application" as utilized in this rule has never been susceptible of precise definition, it has been held to apply where a judgment is " 'executory' or involves the 'supervision of changing conduct or conditions' within the meaning of [the Supreme Court's decisions in *United States v. Swift & Co*, 286 U.S. 106,

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however, the facts here provide a more compelling basis for relief than the facts at issue in *Pierce*. In *Pierce*, the Oklahoma Supreme Court overruled previous state case law which the Tenth Circuit had relied upon in reaching its decision. Here, by contrast, the *Guggenheim* Court did not change New York law but found state law to have been contrary to *DeWeerth* all along. While New York law was held in *Guggenheim* not to have changed, the *Guggenheim* opinion is itself, of course, a new development.

[10] A Rule 60(b)(6) motion may not serve as a substitute for a plaintiff's failure to pursue an appeal. *Matarese v. LeFevre*, 801 F.2d 98, 107 (2d Cir.1986). Here, however, where plaintiff pursued all of her available appellate remedies, this principle does not present a barrier.

52 S.Ct. 460, 76 L.Ed. 999 (1932) and *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 15 L.Ed. 435 (1856).]" *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1138 (D.C.Cir.1988).

Rule 60(b)(5)'s prospective application clause has most often been utilized to modify judgments granting injunctive relief; where injunctive relief has been awarded, and the law upon which such relief is premised later changes, a court may amend its injunctive decree. See *Rufo v. Inmates of Suffolk County Jail*, ____U.S.____, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992); *System Federation No. 91 Railway Employees Department, AFL-CIO v. Wright*, 364 U.S. 642, 650 n. 6, 81 S.Ct. 368, 372 n. 6, 5 L.Ed.2d 349 (1960) ("There are many cases where a mere change in decisional law has been held to justify modification of an outstanding injunction" [citing cases]). At the other end of the spectrum, a money judgment will not usually be considered a judgment with "prospective application" pursuant to Rule 60(b)(5). See *Twelve John Does*, 841 F.2d at 1138.

The relief plaintiff seeks in this case, the return of a stolen painting, falls somewhere between the supervisory injunction and monetary judgment cases described above. The relief plaintiff seeks here is a form of specific performance, generically injunctive in nature – the physical return of a unique piece of art, rather than money damages. Transfer and possible international shipment of a valuable work of art may involve some further recourse to the court, but do not involve the level of judicial supervision required where changing conduct or conditions must be monitored. Although not by itself conclusive, the continuing effect of the judgment on future custody of the painting, in contrast to the effect of such a judgment upon fungible items such as money, is also relevant. Without holding that *res judicata* consequences of a decision are in themselves necessarily sufficient to trigger applicability of Rule 60(b)(5), the importance of the *res judicata* or "quiet title" effect is magnified when a future chain of custody and ownership of a valuable art object are affected.[11]

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[11] In *Kirksey v. City of Jackson*, 714 F.2d 42 (5th Cir.1983) the Court indicated that Rule 60(b)(5) relief may be justified if the law changes subsequent to

(Footnote continued)

Since I find that plaintiff has in any event clearly stated valid grounds for relief under Rule 60(b)(6), it is unnecessary to determine whether relief would also be justified pursuant to Rule 60(b)(5), but on balance I conclude that plaintiff is entitled to relief on this additional ground.

X

I must also consider the impact which the Second Circuit's denial without opinion of plaintiff's motion to recall its mandate should have on the disposition of plaintiff's motion here. Where an appeals court rules on an issue, "[t]he court of appeals' rulings are the law of the case, and the district court is bound to follow them; it has no jurisdiction to review or alter them." *Eutectic Corp. v. Metco Inc.*, 597 F.2d 32, 34 (2d Cir.1979). The law of the case doctrine, however, applies only to issues which have been reviewed and determined by a court. "While it is true that issues considered and disposed of by an appellate court on appeal cannot thereafter be altered by a district court, it may consider matters not explicitly or implicitly decided." *Panama Processes, S.A. v. Cities Service Co.*, 789 F.2d 991, 994 (2d Cir.1986) (citations omitted). In this case, the lack of any opinion accompanying the Court of Appeals' denial of plaintiff's motion to recall its mandate requires that this court attempt to determine the basis for the Second Circuit's decision. Either of two possible rationales may have been the basis for the Court's ruling.

First, the Court could have determined that plaintiff had not stated any ground for relief pursuant to Rule 60(b) from the Court's mandate with respect to the due diligence requirement. As discussed in detail above, however, denial of plaintiff's motion on this ground would, I believe, raise serious questions about the relationship between the state and federal courts under *Erie*,

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the initial decision and if the parties would be bound by the previous judgment by *res judicata*: "If a dismissal would bar a new and independent action between the same parties based on the same claims . . . then it would have 'prospective application' by virtue of the continuing effect of the bar." Id. at 43.

resulting in a denial of rights which would have flowed to the plaintiff under state law. I do not believe that the Court would have denied relief on this ground. As the Second Circuit noted in one diversity case in which it modified its previous decision after a state Supreme Court ruling reversed an intermediate state court order upon which the Court had relied, "[t]his Circuit has long shown considerable willingness to correct what it believed an erroneous interpretation of the law when an intervening state decision seemed to indicate a better view." *Braniff Airways Inc. v. Curtiss-Wright Corp.*, 424 F.2d 427, 429 (2d Cir.), *cert. denied* 400 U.S. 829, 91 S.Ct. 59, 27 L.Ed.2d 59 (1970). I have no reason to believe the Court would not have followed the same reasoning here.

There is a more probable alternative rationale which the Court of Appeals could have adopted in denying plaintiff's motion, namely that the relief should properly have been sought from the district court in the first instance.

In *Standard Oil Company v. United States*, 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976) the Supreme Court held that a Rule 60(b) motion based on events subsequent to an appellate mandate and seeking to overturn a judgment summarily affirmed by the Supreme Court, could be pursued in the district court without the leave of the Supreme Court and without withdrawal of the Supreme Court's mandate. The Supreme Court reasoned that in cases where a litigant sought relief from a final judgment based upon events occurring subsequent to an appellate ruling, the trial court, rather than the appellate court, "is in a much better position to pass upon the issues presented." Id. at 19, 97 S.Ct. at 32. Appellate permission was considered unnecessary because a district court would be capable of recognizing a frivolous 60(b) motion and because a district court ruling premised upon events occurring subsequent to an appellate court decision would not flout an appellate mandate.

While *Standard Oil* dealt with a change in circumstances arising from the alleged misconduct of a government counsel and material witness, the doctrine has since been applied to motions based upon a change in decisional law rendered subsequent to

an appellate decision. *LSLJ Partnership v. Frito-Lay, Inc.*, 920 F.2d 476 (7th Cir.1990) (*en banc*). An essentially identical fact pattern is presented in this case. Here plaintiff with meritorious grounds for relief pursuant to Rule 60(b) directed her motion in the first instance to the appeals court. Following the Supreme Court's ruling in *Standard Oil*, it was appropriate for the Second Circuit to deny plaintiff's motion so that the motion could be determined in the first instance here; I infer, after reviewing the history of this action, that this was the reason for the Second Circuit's denial of plaintiff's motion to recall the Court's mandate.

Since I infer that the Second Circuit denied plaintiff's motion to recall its mandate on the basis that the motion should have been initially determined by the district court, granting plaintiff's motion does not flout the Second Circuit's mandate, or the law of the case as established by the Court of Appeals.

Even if, however, the contrary were to be determined to be the case, as mentioned in part I above, *United States v. Fernandez*, 506 F.2d 1200 (2d Cir.1974), decided prior to *Standard Oil*, indicates that the appellate court may reverse the district court action on grounds of violation of the earlier mandate, but then achieve the same result as that reached in *Standard Oil*, albeit by a more circuitous route, by remanding with instructions to act in accordance with the changed conditions involved rather than the earlier mandate.

XI

Defendant has renewed its claim, which I rejected in my earlier findings, that plaintiff's suit is barred by laches. The Court of Appeals in its 1987 decision, 836 F.2d at 112 & n. 7, referred to the possibility of laches in this case.

I have reconsidered the question and conclude that my original findings in the April 20 Order should be amplified to reflect the importance of the presence in the case of a nonbankrupt third party defendant, permitting defendant to pursue responsibility for lack of care in purchasing and reselling the art up

the chain of possession. Thus plaintiff's delay does not put the innocent purchaser in the position of facing loss of the asset without recourse, whereas a ruling for defendant would leave plaintiff, as the theft victim, with no recourse at all. The balancing of the equities, with due consideration to the difficulty of an owner who lacks institutional resources to trace stolen art, favors rejection of the laches claim here.

A claim may be barred by the defense of laches where a plaintiff unreasonably delays commencing an action and that delay operates to the prejudice of a defendant. *In Re Estate of Barbash*, 31 N.Y.2d 76, 334 N.Y.S.2d 890, 894-895, 286 N.E.2d 268, 271-272 (1972); see also *Southside Fair Housing Com. v. City of New York*, 928 F.2d 1336, 1354 (2d Cir.1991). In reviewing a laches defense, a court must balance the two factors of delay and prejudice, and then apply that balancing test to the facts of the case. *Stone v. Williams*, 873 F.2d 620, 623-625 (2d Cir.1989) ("*Stone I*"), *rev'd on other grounds* 891 F.2d 401 (2d Cir.1989) *cert. denied* 496 U.S. 937, 110 S.Ct. 3215, 110 L.Ed.2d 662 (1990) ("*Stone II*"). Because of the particularly fact sensitive nature of the laches inquiry and the lack of any objective standard pursuant to which a laches defense will be held to bar an otherwise valid claim, an assessment of whether a plaintiff is guilty of laches is committed to the sound discretion of the trial court. See *Stone I*, 873 F.2d at 623- 624.

In assessing delay, the focus is on the reasonableness of a plaintiff's delay rather than on its length. Where a plaintiff delays in bringing suit because she is "justifiably ignorant of the facts giving rise to the cause of action," a laches defense will not operate. *In Re Estate of Barbash*, 334 N.Y.S.2d at 895, 286 N.E.2d at 271; see also *Stone I*, 873 F.2d at 624-625.

It is also important to recognize that "[l]ack of diligence, standing alone, is insufficient to support a claim of laches; the party asserting the claim also must establish that it was prejudiced by the delay." *Majorica, S.A. v. R.H. Macy & Co. Inc.*, 762 F.2d 7, 8 (2d Cir.1985); *Augustine v. Szwed*, 77 A.D.2d 298, 432 N.Y.S.2d 962, 965 (App.Div. 4th Dept 1980). The prejudice which will support a laches defense may take several forms. The

passage of time may make it more difficult for a defendant to defend against a claim by virtue of the death of witnesses, lost evidence or faded memories, or a defendant may have changed position in reliance upon the absence of a suit. *Stone I*, 873 F.2d at 625; *Augustine*, 432 N.Y.S.2d at 965-966. Courts should also consider the underlying value of repose when reviewing a laches argument and reject a laches defense where a defendant has engaged in egregious conduct which would obviate any prejudice the defendant might have suffered. *Stone I* at 626; *Stone II*, 891 F.2d at 404; *Augustine* at 966.

In the April 20 Order, I explicitly held that Mrs. DeWeerth had not unreasonably delayed in prosecuting her claims for purposes of determining the running of the statute of limitations. As noted *supra*, the Court of Appeals for the Second Circuit, acting prior to *Guggenheim*, reached the opposite conclusion. The Court of Appeals reviewed my findings on this issue on a *de novo* basis, holding that such review is appropriate where an appellate court considers the application of a legal standard by a district court to a set of facts (in this case, the "due diligence" requirement announced in *DeWeerth*, 836 F.2d at 110). In contrast, "[a] ruling on the applicability of laches is overturned only when it can be said to constitute an abuse of discretion." *Stone I*, 873 F.2d at 624 (citations omitted).

More significantly, however, I found in the April 20 Order that even if plaintiff had unreasonably delayed in asserting a claim, defendant suffered no prejudice as a result. The evidence before me demonstrated that Mrs. DeWeerth had inherited the Monet from her father and subsequently neither sold it nor conveyed it to anyone else. Moreover, after analyzing the specific arguments made by the defendant with respect to the prejudice allegedly caused by plaintiff's delay, in particular the prejudice defendant allegedly suffered by virtue of the death of Mrs. DeWeerth's sister, I held that these arguments were without merit:

> Even if plaintiff had unreasonably delayed her demand, defendant cannot show that she was prejudiced by the delay. She has argued that because of the delay

> the testimony of Frau von Palm, the only person who could testify as to what happened to the painting, has been irretrievably lost. This argument fails because it assumes, contrary to all other evidence presented, that Frau von Palm's testimony would have been favorable to her.
>
> It also fails because it is simply not true. Defendant could have deposed Reichenbach to attempt to trace the history of the painting's transfers, but she did not. Having failed to exhaust obvious paths of inquiry she cannot sustain her burden of proving that she was prejudiced. April 20 Order at 695, n. 10.

It may be that the Second Circuit believed this determination was clearly erroneous. Given the fact that it never explicitly reached the laches issue, however, either in its December 30 Order or in its denial of plaintiff's motion for the recall of its mandate, I do not assume that the Second Circuit reached such a conclusion.[12]

To the extent that my April 20 Order did not clearly address the laches issue, I believe it would be appropriate to clarify that Order here: plaintiff, in prosecuting this action, was not guilty of laches. Plaintiff did not unreasonably delay in prosecuting her claims. And even assuming plaintiff did fail to exercise due diligence in searching for her stolen painting, defendant suffered no prejudice as a result.

Defendant, of course, has possessed the Monet for many years – constituting an advantage of value since monies would have had to be paid to rent the painting for that period, but also doubtless exacerbating the pain which will be incident to loss of the art object. Like plaintiff, defendant has, of course, been

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[12] Apart from laches, the Court of Appeals in *DeWeerth* referred to evidentiary issues which it did not discuss. I conclude that the Court did not find them potentially dispositive. Otherwise it would presumably have ruled based upon them rather than adopting a state law interpretation not clearly foreshadowed by prior state rulings, thus implicating the constitutional dimensions of *Erie*.

victimized by an unknown wrongdoer or wrongdoers – the original thief and those who passed on the painting with knowledge or suspicion of its theft or lack of due care in buying and selling it. But defendant also has recourse at least one step backward up the chain of custody.

The value of repose inherent in the laches defense would certainly be furthered by denying plaintiff's motion. But the fact that a long time has passed since defendant purchased the painting in and of itself does not mean that plaintiff is barred by laches. New York's political and judicial systems have made and reaffirmed a considered choice in cases where the rights of original owners and subsequent innocent purchasers collide. Inherent in that choice, as in any choice which might be imagined on the issue, is that one of two innocent victims will be harmed, sometimes at a point when she may legitimately feel that the passage of time has long since made her right to possession inviolate. As has been restated innumerable times, however, it is not the province of the federal judiciary to second guess the manner in which New York has resolved this dilemma; neither can New York's policy be obviated by the utilization of an equitable doctrine imbued with sufficient flexibility to achieve a preferred result.[13]

XII

Since I find that plaintiff has asserted valid grounds for relief pursuant to Federal Rule of Civil Procedure 60(b)(6) and that this court has the authority to grant it, the Memorandum Order of April 20, 1987 is readopted as amplified herein. Plaintiff is directed to submit a proposed judgment.

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[13] This is not to suggest, of course, that the defense of laches may not be utilized under appropriate circumstances to bar a claim for the recovery of a stolen chattel. Indeed the New York Court of Appeals in *Guggenheim* explicitly held that a claim timely commenced under New York's demand and refusal law might be barred by the laches doctrine and that in assessing such a laches argument, a plaintiff's lack of diligence in pursuing a claim would be relevant. *Guggenheim*, 567 N.Y.S.2d at 628, 569 N.E.2d at 431. I merely hold that under the particular facts of this case, the defense of laches here does not bar plaintiff's claim.

SO ORDERED

Dated: White Plains, New York
~~September~~ October 16, 1992

/s/ Vincent L. Broderick
VINCENT L. BRODERICK, U.S.D.J.

APPENDIX C

BEST AVAILABLE COPY

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23rd day of August, on thousand nine hundred and ninety-four.

GERDA DOROTHEA DEWEERTH,
Plaintiff-Appellee,

v.

EDITH MARKS BALDINGER,
Defendant-Third-Party Plaintiff-Appellant,

v.

WILDENSTEIN & CO., INC..,
Third-Party Defendant-Appellant.

DOCKET NUMBER: 93-7144

[UNITED STATES COURT OF APPEALS FILED AUG 23 1994 GEORGE LANGE III, CLERK SECOND CIRCUIT]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by **Appellee Gerda Deweerth.**

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has required that a vote be taken thereon.

FOR THE COURT,
GEORGE LANGE III, Clerk
By:
/s/ Carolyn Clark Campbell
Carolyn Clark Campbell
Chief Deputy Clerk